

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL **75-7286**

United States Court of Appeals

For the Second Circuit.

MANUEL M. KOUFMAN,
Plaintiff-Appellant,
against

INTERNATIONAL BUSINESS MACHINES
CORPORATION,
Defendant-Appellee,

BENDERSON DEVELOPMENT COMPANY, Inc.,
and JACK CHESBRO,
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

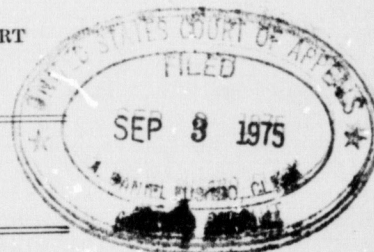
JOINT APPENDIX.

WILLIAM T. GRIFFIN,
Attorney for Plaintiff-Appellant,
161 William Street,
New York, N. Y. 10038
962-5442.

CRAVATH, SWAIN & MOORE,
Attorney for Defendant-Appellee,
International Business Machines
Corporation,
One Chase Manhattan Plaza,
New York, N. Y. 10005
HA 2-3000.

THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 782-6978—1975

(6431)



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United States Court of Appeals

FOR THE SECOND CIRCUIT.

MANUEL M. KOUFMAN,*Plaintiff-Appellant,**against***INTERNATIONAL BUSINESS MACHINES CORPORATION,***Defendant-Appellee,***BENDERSON DEVELOPMENT COMPANY, Inc., and****JACK CHESBRO,***Defendants.*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

Relevant Docket Entries.

Date	Proceedings
1966	
Mar. 29	Filed complaint and issued summons
Apr. 20	Filed Answer of defts. Benderson Development Co., Inc. & Jack Chesbro
Apr. 21	Filed Answer of deft. IBM
May 11	Filed Amended Answer of deft. IBM
June 10	Filed Special Master's Report—Potter

Relevant Docket Entries

June 10 Filed memo endorsed—preamble to item 1 of plttf's motion is amended as indicated—1a & 1k are granted—items 1e, 1f & 1j are denied—item 1b is amended as indicated 1c IBM shall produce as indicated—1d is granted as indicated 1g is denied—1h is amended & so granted—1i is granted to extent indicated—item 2 is amended & so granted—with respect to plttf's motion of rules 30 b & d plttf shall appear within 30 days for deposition all discovery called for by this order shall be completed within 30 days—Wyatt, J m/n

1968

- Apr. 16 Filed Memorandum in Support of Motion by Deft. Int. Bus. Mach. Corp. IBM for Partial Summary Judgment
- Apr. 16 Filed Deft. Notice of Motion for partial Summary Judgment 9g Statement and Affdvts. ret. 4-16-68
- Apr. 18 Pre-trial—Ryan, J.
- May 6 Filed Pltffs. Memorandum in opposition to Motion for Partial Summary Judgment
- May 6 Filed Affdvt. and 9G Statement in Opposition to motion for Partial Summary Judgment ret. 5-7-68

1969

- Feb. 4 Filed affidavit by Thomas F. Daly in support of IBM's motion for summary judgment.
- Feb. 4 Filed affidavit by Robert Layton *Re:* depositions of deft's.
- Feb. 4 Filed memorandum #35581 (Opinion: Motion by deft. (IBM) for summary judgment: The motion is granted, as indicated. So ordered. Wyatt, J. m/n

Relevant Docket Entries

Dec. 15 Filed stip & order of substitution of atty. for plttf—So ordered—Edelstein, J.

1971

Mar. 9 Filed Deft International Business Machines Corp. Interrogs directed to the plttf.

Apr. 20 Filed Transcript of record of proceedings, dated Feb. 22—1971.

1974

Dec. 11 Filed affirmation by plttfs att'y (Wm. T. Griffin.)

1975

Apr. 17 Filed Order—the stipulation dated 4-11-75, annexed hereto is approved—judgment is directed to be entered pursuant to Rule 54-(b) FRCP dismissing Count 1 of the complaint on the merits, with prejudice and without costs—pursuant to Rule 20 (a) of the Individual assignment and Calendar Rules for the SDNY, Counts II and III be closed statistically—and transferred to the Suspense Docket—and this Order shall not be considered a dismissal of Counts II and III which may be reinstated in accordance with the provisions of the annexed stipulation. Cannella, J. Judgment entered- 4-17-75 Clerk (m/m)

Complaint.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

MANUEL M. KOUFMAN,

Plaintiff,

against

INTERNATIONAL BUSINESS MACHINES CORPORATION, BENDER-
SON DEVELOPMENT COMPANY, Inc. and JACK CHESBRO,

Defendants.

Plaintiff, Manuel M. Koufman, by Gilbert, Segall and Young, Esqs., his attorneys, complaining of the defendants, alleges as follows:

COUNT I

1. Plaintiff is a resident of the State of Massachusetts.
2. On information and belief, at all times hereinafter mentioned, defendant, International Business Machines Corporation ("IBM"), was and now is a corporation organized and existing under the laws of the State of New York, with its principal place of business at 425 Park Avenue, New York, New York.
3. The jurisdiction of this Court is based upon Title 28, United States Code, Section 1332. The matter in controversy exceeds the sum of \$10,000, exclusive of interest and costs.
4. On or about June 25, 1963, plaintiff and IBM entered into a written contract (hereinafter called the "contract") whereby plaintiff agreed to develop for IBM a tract of land in Cranford, New Jersey, and to lease the building

Complaint

constructed on said land to IBM, with an option to IBM to purchase the land and building, all under the terms and conditions set forth in the contract.

5. Plaintiff has duly performed all the conditions and covenants contained in the contract on his part to be performed, other than those conditions and covenants the performance of which was prevented by IBM, and other than those conditions and covenants the performance of which IBM duly waived.

6. IBM breached said contract with plaintiff in that it failed and neglected to perform the conditions and covenants of the contract on its part to be performed and in that on or about August 27, 1963, IBM notified plaintiff in writing that it had entered into a new agreement with a third person for the development of the subject matter of the contract with plaintiff, i. e., the tract of land in Cranford, New Jersey.

7. By reason of the foregoing, plaintiff has sustained damage in the sum of \$1,900,000.

COUNT II

8. Plaintiff incorporates by reference and realleges the allegations contained in Paragraphs "1" through "6" inclusive of Count I with the same force and effect as though fully set forth herein.

9. On information and belief, defendant, Jack Chesbro ("Chesbro") is a resident of the State of New York.

10. On information and belief at all times hereinafter mentioned defendant, Benderson Development Company, Inc. ("Benderson") was and now is a corporation organized in and existing under the laws of the State of New York with its principal place of business at 135 Delaware Avenue, Buffalo, New York.

Complaint

11. On information and belief, Benderson and Chesbro at all times hereinafter referred to had due notice and knowledge of the contract between plaintiff and IBM, and were put on inquiry as to all the provisions, matters and things therein contained.

12. On information and belief, on or about August 27, 1963, Benderson and Chesbro wrongfully, knowingly, intentionally and maliciously induced, persuaded and procured IBM to violate, repudiate and breach the said contract and to refuse to proceed further thereunder, and to enter into a contract with Benderson for the development of the tract of land in Cranford, New Jersey.

13. On information and belief, in consequence and as a direct result of the acts of Benderson and Chesbro hereinbefore set forth, IBM violated, repudiated and breached the contract with plaintiff, and refused to continue therewith and duly notified plaintiff to that effect.

14. By reason of the foregoing plaintiff has been substantially injured in his reputation and in his business, and has sustained damage in the sum of \$2,100,000.

COUNT III

15. Plaintiff incorporates by reference and realleges the allegations contained in Paragraphs "1" through "4" inclusive of Count I with the same force and effect as though fully set forth herein.

16. On or about June 29, 1963, IBM requested plaintiff to render services in connection with the reduction of the cost of construction of the building on the tract of land in Cranford, New Jersey.

17. From on or about June 29, 1963, to on or about August 25, 1963, plaintiff performed certain work, labor,

Complaint

and services for IBM in connection with the construction costs of the building on the tract of land in Cranford, New Jersey.

18. Said services were performed by plaintiff without any written contract requiring such performance, but at all the said times, IBM requested the said services and accepted the same and received the benefits thereof. IBM was unjustly enriched thereby and has refused to make payment therefor.

19. By reason of the foregoing, plaintiff has sustained damage in the amount of \$100,000.

WHEREFORE, plaintiff demands judgment as follows:

(1) On the First Count against IBM the sum of \$1,900,000 with interest thereon from the 27th day of August, 1963, together with costs and disbursements of this action.

(2) On the Second Count against Benderson and Chesbro, the sum of \$2,100,000 with interest thereon from the 27th day of August 1963 together with costs and disbursements of this action.

(3) On the Third Count against IBM the sum of \$100,000 with interest thereon from the 25th day of June, 1963 together with the costs and disbursements of this action.

GILBERT, SEGALL AND YOUNG

By ROBERT LAYTON
A Member of the Firm
Attorneys for Plaintiff
Office & P. O. Address
405 Park Avenue
New York, New York
PLaza 2-9650

**Amended Answer of Defendant International Business
Machines Corporation.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Defendant International Business Machines Corporation (hereinafter referred to as IBM), for its amended answer to the complaint herein:

FOR A FIRST DEFENSE:

1. States that it is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraphs 1, 3, 9 and 10 thereof except that the amount in controversy purports to exceed \$10,000, exclusive of interest and costs.

2. Denies each and every averment in paragraph 2 thereof except that it is a New York corporation having an office at 425 Park Avenue, New York, N. Y.

3. Denies each and every averment in paragraphs 4 through 7, 11 through 14 and 16 through 19 thereof.

4. In response to paragraphs 8 and 15 thereof, repeats its responses to the paragraphs therein repeated by reference.

FOR A SECOND DEFENSE, IN THE ALTERNATIVE:

5. Should it be found that an agreement existed as claimed by plaintiff, plaintiff from on or about June 6, 1963, and continuing thereafter at all times material herein, refused and failed to perform his obligations under such alleged agreement and repudiated the same in that he failed and refused to erect, to finance the erection, to

*Amended Answer of Defendant International Business
Machines Corporation*

lease or to agree to lease the said building to IBM in accordance with the terms and conditions of such alleged agreement.

6. Plaintiff further repudiated and refused to perform his obligations under such alleged agreement in that he demanded that IBM pay amounts over and above those specified therein and demanded that IBM perform conditions and terms not specified therein.

FOR A THIRD DEFENSE, IN THE ALTERNATIVE:

7. The alleged agreement set forth in paragraph 4 of the complaint appears on the face of the complaint to have been for an interest in real estate and for the leasing for a longer period than one year of real property.

8. Neither such agreement, nor any note or memorandum thereof expressing the consideration was in writing subscribed by IBM, or by its lawful agent thereunto authorized by writing.

9. The action is barred by the applicable statute of frauds.

WHEREFORE, defendant International Business Machines Corporation demands judgment dismissing the complaint, together with its costs and disbursements.

May 10, 1966.

CRAVATH, SWAINE & MOORE,
by /s/ JOHN R. HUPPER
A member of the firm
Attorneys for Defendant
International Business Machines Corporation,
1 Chase Manhattan Plaza,
New York, N. Y. 10005

Answer of Defendants Benderson Development Company, Inc., and Jack Chesbro.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Defendants, Benderson Development Company, Inc., and Jack Chesbro, by their attorney, Robert S. Weinstein, Esq., answering the Complaint of the Plaintiff herein alleges upon information and belief:

FIRST: Deny having the knowledge or information sufficient to form a belief as to the allegations contained within the paragraphs numbered and styled "1", "2", "3", "4", "5", "6", "7", "16", "17", "18", and "19".

SECOND: Admit the allegations contained within the paragraphs numbered and styled "9" and "10".

THIRD: Deny the allegations contained within the paragraphs numbered and styled "11", "12", "13", and "14".

FOURTH: Deny each and every other allegations not heretofore specifically admitted, denied, or otherwise controverted.

Answer of Defendants Benderson Development Company, Inc., and Jack Chesbro

WHEREFORE, the Defendants demand judgment dismissing the Complaint of the Plaintiff and the counts contained therein where same apply to these Defendants together with the costs and disbursements of this action.

Yours, etc.

s/ ROBERT S. WEINSTEIN
Attorney for Defendants,
Jack Chesbro and Benderson
Development Company, Inc.
135 Delaware Avenue
Buffalo, New York 14202

To:

Gilbert, Segall & Young
Attorneys for Plaintiff
405 Park Avenue
New York, New York

**Notice of Motion of Defendant IBM to Dismiss Count I
of the Complaint.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Please Take Notice that, upon the pleadings, the annexed affidavits of John H. Grady, sworn to April 11, 1968, and exhibit thereto, and Alan J. Hruska, sworn to April 15, 1968, and exhibits thereto, and the annexed statement of defendant International Business Machines Corporation (IBM) pursuant to Rule 9 (g) of the General Rules of this Court, dated April 15, 1968 defendant IBM will move this Court at Room 506, United States Court House, Foley Square, New York, New York, on April 30, 1968, at 10:00 a.m., or as soon thereafter as counsel can be heard, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for an order in its favor dismissing on the merits Count I of the complaint, upon the ground that there is no genuine issue as to any material fact and defendant IBM is entitled to judgment thereon as a matter of law, and expressly determining that there is no just reason for delay and directing the entry of

*Notice of Motion of Defendant IBM to Dismiss Count I
of the Complaint*

judgment, and for such other and further relief as may
be just and proper.

April 15, 1968.

CRAVATH, SWAINE & MOORE,
By s/ ALAN J. HRUSKA
A member of the Firm
Attorneys for defendant
International Business Machines Corporation,
1 Chase Manhattan Plaza,
New York, N. Y. 10005

To:

Messrs. Gilbert, Segall and Young,
Attorneys for plaintiff,
405 Park Avenue,
New York, N. Y. 10022

Robert S. Weinstein, Esq.,
Attorney for defendants
Benderson Development Company, Inc.
and Jack Chesbro,
266 Pearl Street,
Buffalo, New York.

Statement of Defendant International Business Machines Corporation (IBM) Pursuant to Rule 9(g).

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Pursuant to Rule 9(g) of the General Rules of this Court, IBM submits that there does not exist any genuine issue of fact to be tried with respect to plaintiff's first claim and that IBM is entitled to judgment thereon as a matter of law because such claim is deficient under contract law and is barred by the statute of frauds, and specifically that there is no genuine issue of fact with respect to the following matters:

1. IBM is a New York corporation with its principal place of business in New York. Plaintiff is a resident of Massachusetts.

2. On or about May 23, 1963, Thomas F. Daly, an administrator in the real estate department of the Eastern Region of IBM's Data Processing Division, sent to plaintiff the letter and enclosures, copies of which are annexed as Exhibit A to the affidavit of Alan J. Hruska, sworn to April 15, 1968, submitted in support of IBM's motion for summary judgment.

3. On or about June 6, 1963, plaintiff sent to Daly the letter and enclosures, copies of which are annexed as Exhibit B to the Hruska affidavit. That Exhibit constituted plaintiff's proposals with respect to the construction of a building in Cranford, New Jersey, and the lease of it to IBM for a term of 17 years. The General Conditions, incorporated by reference in plaintiff's proposals, expressly provided that the "responsibility" for the taxes and insurance "will be negotiated by the parties at a later date".

Statement of Defendant International Business Machines Corporation (IBM) Pursuant to Rule 9(g)

4. On June 19, 1963, plaintiff met in New York with Daly and Daly's immediate superior, George C. Roper, Jr., to review the bids which had been submitted by various contractors on the construction of the building. When those bids were opened it became apparent that they exceeded the estimated cost of construction. Roper then stated that he would "have to go back to higher authority" in order to proceed with the project, unless the costs could be reduced.

5. On or about June 24, 1963, Roper sent to plaintiff a letter, copy of which is annexed to the Hruska affidavit as Exhibit C. At that time there had not yet been any attempt made to achieve any reduction in construction costs.

6. The only writings on which plaintiff relies as evidence of the alleged contract are the three letters referred to above.

7. No agreement was ever reached as to whether either party would bear full responsibility for the taxes and insurance on the property or how, if at all, such costs would be allocated between them.

8. In 1963, the published ratio of assessed-to-true values in the Township of Cranford, New Jersey, was 24.50 and the general tax rate in the Township was \$11.35 per \$100. Based on those figures and the estimated cost of the land and building (\$1,230,000), the tax on the total property would have been approximately \$24,000 a year.

9. Plaintiff did not acquire any land or construct any building in connection with the proposed project.

10. Neither Roper nor Daly had any authority, in writing or otherwise, to execute or enter into any contract on behalf of IBM.

Affidavit of Alan J. Hruska in Support of Motion

11. The Cranford project was planned in IBM's New York offices; all writings concerning the alleged agreement were either sent from or addressed to those offices; and the negotiations between plaintiff and IBM representatives occurred in New York.

April 15, 1968

Respectfully submitted,

CRAVATH, SWAINE & MOORE

Attorneys for defendant

International Business Machines Corporation

1 Chase Manhattan Plaza

New York, N. Y. 10005

Affidavit of Alan J. Hruska in Support of Motion.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York,
County of New York, ss:

ALAN J. HRUSKA, being duly sworn, deposes and says:

I am an attorney-at-law and a member of the firm of Cravath, Swaine & Moore, attorneys for defendant, International Business Machines Corporation (IBM). I am familiar with prior proceedings herein. I make this affidavit in support of IBM's motion for partial summary judgment, pursuant to FRCP 56(b), dismissing plaintiff's first claim.

Affidavit of Alan J. Hruska in Support of Motion


Annexed hereto as Exhibits A, B and C, respectively, are true and complete copies of (1) a letter dated May 23, 1963, with enclosures, (2) a letter dated June 6, 1963, with enclosures, and (3) a letter dated June 24, 1963. Plaintiff, on the deposition taken of him by IBM, identified those letters and enclosures as the sole writings on which he relied to form the alleged "written contract" and they were marked for identification, respectively, as defendant IBM Exhibits A, B and C.

Annexed hereto as Exhibits D and E, respectively, are true and complete copies of pages from the depositions conducted in this action of plaintiff and George Roper, an IBM employee, which are referred to in the brief submitted by IBM in support of this motion.

Annexed hereto as Exhibits F and G, respectively, are copies of the 1963 Equalization Table for Union County, New Jersey (bearing a copy of the certificate of the County Board of Taxation), and the 1963 Abstract of Ratables for that County, both of which I obtained from the Tax Assessor's Office in Cranford, New Jersey.

(Sworn to by Alan J. Hruska, April 15, 1968.)

**Exhibit A, Annexed to Affidavit of Alan J. Hruska—
Letter, Dated May 23, 1963, With Enclosures.**

(See opposite and following pages.) 

19a

IBM
225 Park Avenue

Data Processing Division
New York Regional Office
425 Park Avenue, New York 22, N.Y.

International Business Machines Corporation

PLaza 1-6060

May 23, 1963

RE: Proposed Building for IBM
Elizabeth (Cranford), New Jersey

Since you have indicated an interest in the above project, we are enclosing detailed information pertaining to our proposed new building in Cranford, New Jersey. If after reviewing the enclosed information you desire to submit a proposal for the construction and leasing to IBM of the proposed building, we would be most happy to entertain such a proposal from you.

If you choose to submit a proposal we would like to specifically request adherence to the following:

- 1 - Submit the proposal on the enclosed form, signing same in the place indicated.
- 2 - Submit your proposal to the undersigned so as to reach this office no later than June 6, 1963, so that all proposals can be reviewed, with the project to be awarded as soon as practical. Proposals received subsequent to this date may not be given consideration.

We wish to take this opportunity to thank you for your interest in IBM and request that you advise us if any further clarification is necessary.

Very truly yours,

Thomas F. Daly, Administrator
Real Estate Department

TFD:HVM
Enclosure

DATE: _____

Mr. Thomas F. Daly
 Real Estate Department
 IBM Corporation
 425 Park Avenue
 New York 22, New York

RE: Proposed Building for IBM
Elizabeth (Cranford) New Jersey

Dear Mr. Daly:

In reply to your letter of May 23, 1963 covering the subject location we would like to submit a proposal, in duplicate, as outlined below.

RENTAL:

We have completed at least one of Items 1 through 4, and in addition Items 5 and 6 as you have requested.

OPTION TO PURCHASE:

IBM will have an option to purchase the property as specified in Item 5, with the understanding that IBM may have to assume outstanding mortgages. I have indicated my thinking at this time as to whether or not IBM will be responsible to assume the mortgages.

We understand that we will be required to purchase the land and reimburse IBM, or its representatives, for any expenses that may have been incurred up to the time of said purchase in connection with this program. We agree to accomplish this within thirty (30) days from the time the project is awarded to us.

ITEM 1

I will lease the entire building to IBM for a term of 17 years, with IBM being responsible for the maintenance, at an annual rental of:

With an annual rental for the entire building

\$ _____

During the first 5 year renewal term of:

\$ _____

During the second 5 year renewal term of:

\$ _____

During the third 5 year renewal term of:

\$ _____

Mr. Thomas F. Daly
 RE: Elizabeth, Sales Office
 (Cranford, N. J.)

ITEM II

I will lease the entire building to IBM for a term of 17 years, with the landlord being responsible for the maintenance, at an annual rental of:

\$ _____

With an annual rental for the entire building

During the first 5 year renewal term of:

\$ _____

During the second 5 year renewal term of:

\$ _____

During the third 5 year renewal term of:

\$ _____

ITEM III

I will lease the entire building to IBM for a term of 17 years, with IBM being responsible for the maintenance, at an annual rental of:

\$ _____

And I will sublease back from IBM 13,264 net square feet, for a term of 5 years at an annual rental of:

\$ _____

With an annual rental for the entire building

During the first 5 year renewal term of:

\$ _____

During the second 5 year renewal term of:

\$ _____

During the third 5 year renewal term of:

\$ _____

ITEM IV

I will lease the entire building to IBM, with the landlord being responsible for the maintenance, at an annual rental of: \$ _____

And I will sublease back from IBM 13,264 net square feet,

for a term of 5 years at an annual rental of:

\$ _____

With an annual rental for the entire building

During the first 5 year renewal term of:

\$ _____

During the second 5 year renewal term of:

\$ _____

During the third 5 year renewal term of:

\$ _____

ITEM V

IBM will have the right to purchase the property for the amounts specified on the following page, which will include the outstanding mortgages, in conjunction with the foregoing items. It (will, will not) be necessary for IBM to assume the outstanding mortgages. I have also indicated those instances where I would not be willing to sell the building.

Mr. Thomas F. Daly
RE: Elizabeth Sales Office
(Cranford, N. J.)

22a

<u>UPON COMPLETION</u>	<u>ITEM 1</u>	<u>ITEM 2</u>	<u>ITEM 3</u>	<u>ITEM 4</u>
During 6th Year	\$ _____	\$ _____	\$ _____	\$ _____
During 11th Year	_____	_____	_____	_____
During 16th Year	_____	_____	_____	_____
During 21st Year	_____	_____	_____	_____
During 26th Year	_____	_____	_____	_____
During 31st Year	_____	_____	_____	_____

ITEM VI

I realize that the cost for the land, building and expenses to-date, indicated in the General Conditions of the Proposal, are estimated figures and my annual rental is predicated on the amount indicated. I wish to advise that this annual rent will be adjusted as follows:

- a) Any amount in excess of the amount indicated will increase the annual rental by multiplying said amount by the following percentage: _____%
- b) If the amount expended is less than the amount indicated, the difference will decrease the annual rental by multiplying said amount by the following percentage: _____%

This is to acknowledge that I have received, read, and thoroughly understood the information contained in your General Conditions for Proposal, dated May 23, 1963, and the information submitted is in accordance with the particulars outlined in said Conditions.

Very truly yours,

By:

Firm Name: _____

Address: _____

May 23, 1963

PROPOSED BUILDING

IBM ELIZABETH SALES OFFICE
(Cranford, New Jersey)

GENERAL CONDITIONS FOR PROPOSAL:

SITE:

Unimproved land in the Town of Cranford, consisting of a parcel containing approximately 6+ acres adjacent to the Garden State Parkway, Cleary Street and the Centennial Avenue overpass, and more particularly bounded and described in accordance with the description contained in Exhibit A attached hereto and made a part hereof, as drawn in accordance with a survey made by Sailer & Sailer, Civil Engineers and Surveyors, 64 Broad Street, Elizabeth, New Jersey, dated January 7, 1963.

ZONING:

Area is zoned for IBM's use.

LEASE TERM:

17 Years.

RENEWALS:

Three 5 year renewals.

ARCHITECT:

Victor A. Lundy
Penthouse
6 East 65th Street
New York 21, New York

TAXES & INSURANCE:

They are not to be considered in this proposal. However, responsibility for these items will be negotiated by the parties at a later date.

MAINTENANCE:

The landlord shall be responsible for major repairs to and replacement of the building equipment such as heating, air conditioning, mechanical and electrical, and similar fixtures, appurtenances and equipment where such repair and replacement are necessary because of defective material and faulty installation, normal hardware, decay, fire and other causality. Major repairs and replacements shall include any single repair or replacement which costs in excess of \$500.00. Landlord shall keep in repair the roof and exterior of the building and shall be responsible for the exterior building repairs and maintenance including, without limitations, all structural, wall, floor and ceiling repairs and replacements, of all repairs and replacements made necessary by structural failures and defects, except where such repairs and replacements are required because of tenant's negligence.

LEASE FORM:

Standard IBM form will be used as applicable.

24a

May 23, 1963

PROPOSED BUILDING

IBM ELIZABETH SALES OFFICE
(Cranford, New Jersey)

GENERAL CONDITIONS FOR PROPOSAL:

APPROXIMATE BUILDING SIZE:

	<u>GROSS SQ. FT.</u>
Basement (on grade)	6,972
1st Floor	<u>44,420</u>
TOTAL	51,392
	<u>USABLE SQ. FT.</u>
IBM	31,293
Tenant	<u>13,264</u>
TOTAL	44,557

ESTIMATED COSTS:

Building (including architect's fees)	\$1,030,000.
Land (including additional site work)	200,000.
Expenses to-date	<u>12,500.</u>
TOTAL	\$1,242,500.

SERVICES:

Rentals and sublease rentals quoted are not to include services. All services will be provided by IBM. The tenant will be charged their proportionate share of said expenses based upon the relative ratio that their area represents to the overall area being serviced.

OTHER EXPENSES:

To be entirely the investor's responsibility - interim financing, taxes and insurance during construction, completion bonds, legal fees, and all other financial items incidental to the acquisition of the land and the completion of the building.

SAILER & SAILER
CIVIL ENGINEERS AND SURVEYORS

EXHIBIT A

SIXTY FOUR BROAD STREET
ELIZABETH 4, N. J.
15,294-15,571-15,580

TELEPHONE
PLANNERS 1-2100
AREA CODE 201

I.B.M. GARDEN STATE PARKWAY
TRACT, CRANFORD, NEW JERSEY

BEGINNING at the corner formed by the intersection of the southwesterly line of Cleary Avenue and the northwesterly line of Jackson Street and running; thence (1) south 51 degrees 55 minutes 20 seconds west and along said northwesterly line of Jackson Avenue a distance of 755.41 feet to a point in the easterly right-of-way line of the Garden State Parkway, Route 4; thence the following three courses and distances along said easterly right-of-way line of the Garden State Parkway, Route 4; (2) north 21 degrees 39 minutes 15 seconds east a distance of 83.72 feet to a point; (3) north 19 degrees 34 minutes 05 seconds west a distance of 138.83 feet to a point; (4) north 12 degrees 15 minutes 04 seconds east a distance of 60.70 feet to a point in the southeasterly line of Parcel XR92, as shown on a map entitled, "New Jersey State Highway Department, General Property Parcel Map, Route 4, Parkway, Section 6, Central Ave., Clark Twp. to Lehigh Valley R. R., Cranford Twp.", Sheet 6/13; thence (5) north 51 degrees 55 minutes 20 seconds east and along said southeasterly line of Parcel XR92 a distance of 6.42 feet to a point; thence (6) north 38 degrees 04 minutes 40 seconds west and along the northeasterly line of said Parcel XR92 a distance of 5.32 feet to a point in the aforementioned easterly right-of-way line of the Garden State Parkway, Route 4; thence (7) north 12 degrees 15 minutes 04 seconds east and along said easterly right-of-way line of the Garden State Parkway, Route 4, a distance of 148.37 feet to a point in the southeasterly line of Parcel 95, as shown on the above described State Highway Department Map; thence (8) north 51 degrees 55 minutes 20 seconds east and along said southeasterly line of Parcel 95, a distance of 15.77 feet to a point; thence (9) north 38 degrees 04 minutes 40 seconds west and along the northeasterly line of said Parcel 95 a distance of 12.44 feet to a point in the aforementioned easterly right-of-way line of the Garden State Parkway, Route 4; thence (10) northerly along a curve to the left having a radius of 6150.00 feet, being also along said easterly right-of-way line of the Garden State Parkway, Route 4, an arc distance of 203.14 feet to a point in the southeasterly line of Parcel XR141C, as shown on the above described State Highway

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CIVIL ENGINEERS AND SURVEYORS

SIXTY FOUR BROAD STREET
ELIZABETH 4, N. J.

TELEPHONE
FLANDERS 1-2100
AREA CODE 201

15,294-15,571-15,580

I.B.M. Garden State Parkway
Tract, Cranford, New Jersey
Page -2-


Department Map; thence (11) north 51 degrees 55 minutes 20 seconds east and along said southeasterly line of Parcel XR141C, a distance of 62.15 feet to a point; thence (12) north 38 degrees 04 minutes 40 seconds west and along the northeasterly line of Parcel XR141C, a distance of 44.65 feet to a point in the aforementioned easterly right-of-way line of the Garden State Parkway, Route 4; thence (13) northerly along a curve to the left having a radius of 6150.00 feet, being also along said easterly right-of-way line of the Garden State Parkway, Route 4, an arc distance of 93.10 feet to a point in the southeasterly line of Parcel XR106, as shown on the above described State Highway Department Map; thence (14) north 51 degrees 55 minutes 20 seconds east and along said southeasterly line of Parcel XR106, a distance of 85.15 feet to a point in the aforesaid southwesterly line of Cleary Avenue; thence (15) south 38 degrees 04 minutes 40 seconds east and along said southwesterly line of Cleary Avenue a distance of 620.00 feet to the aforementioned northwesterly line of Jackson Street and the Place of Beginning.

The foregoing description is drawn in accordance with a survey made by Sailer & Sailer, Civil Engineers & Surveyors, 64 Broad St., Elizabeth, N. J., dated January 7, 1963.

27a

(This page intentionally left blank.)

**Exhibit B, Annexed to Affidavit of Alan J. Hruska—
Letter, Dated June 6, 1963, With Enclosures.**

(See opposite and following pages.) 

MANUEL M. KOUFMAN

29a

1330 BEACON STREET
BROOKLINE 46, MASSACHUSETTS
TELEPHONE ASPINWALL 7-2468

June 6, 1963

IBM Corporation
425 Park Avenue
New York, New York

Attention: Mr. Thomas F. Daly, Administrator
Real Estate Department

Re: PROPOSED IBM ELIZABETH SALES OFFICE
(Cranford, New Jersey)

Dear Mr. Daly:

I am enclosing herewith my proposal for the above captioned building, in accordance with the requirements as set forth in yours of May 23.

I trust I am not being presumptuous in making a further proposal as follows: I will lease this property to you for a term of seventeen (17) years with three five (5) year options for \$95,000 per year, net, net, net up to, inclusive of the second five (5) year option, the third five (5) year option at a rental of \$48,000 per year, net, net. During the twenty-sixth (26th) year you may buy the property from me for \$575,000.00.

Thank you for the opportunity of participating in this proposal and trust that the enclosed is favorable to your needs.

Very truly yours,

Enclosure

Manuel M. Koufman

*Dept. IBM at Bldg
425 Park Ave*

KOUFMAN CONSTRUCTION OF BOSTON, INC.
LEGION DEVELOPMENT CORPORATION · KOUFMAN DEVELOPMENT CORPORATION · EAST COAST DEVELOPMENT CORPORATION
NEW BEDFORD SHOPPING CENTER, INC. · N. Y. N. J. DEVELOPMENT CORP.

DATE: June 5, 1963

Mr. Thomas F. Daly
Real Estate Department
IBM Corporation
425 Park Avenue
New York 22, New York

RE: Proposed Building for IBM
Elizabeth (Cranford) New Jersey

Dear Mr. Daly:

In reply to your letter of May 23, 1963 covering the subject location we would like to submit a proposal, in duplicate, as outlined below.

RENTAL:

We have completed at least one of Items 1 through 4, and in addition Items 5 and 6 as you have requested.

OPTION TO PURCHASE:

IBM will have an option to purchase the property as specified in Item 5, with the understanding that IBM may have to assume outstanding mortgages. I have indicated my thinking at this time as to whether or not IBM will be responsible to assume the mortgages.

We understand that we will be required to purchase the land and reimburse IBM, or its representatives, for any expenses that may have been incurred up to the time of said purchase in connection with this program. We agree to accomplish this within thirty (30) days from the time the project is awarded to us.

ITEM 1

I will lease the entire building to IBM for a term of 17 years, with IBM being responsible for the maintenance, at an annual rental of:

With an annual rental for the entire building

\$ 96,600.00

During the first 5 year renewal term of:

\$ 73,600.00

During the second 5 year renewal term of:

\$ 65,000.00

During the third 5 year renewal term of:

\$ 57,600.00

Mr. Thomas F. Daly
RE: Elizabeth Sales Office
(Cranford, N. J.)

31a

ITEM II

I will lease the entire building to IBM for a term of 17 years, with the landlord being responsible for the maintenance, at an annual rental of:

\$ 99,600.00

With an annual rental for the entire building

During the first 5 year renewal term of:

\$ 76,600.00

During the second 5 year renewal term of:

\$ 68,600.00

During the third 5 year renewal term of:

\$ 60,600.00

ITEM III

I will lease the entire building to IBM for a term of 17 years, with IBM being responsible for the maintenance, at an annual rental of:

\$ 96,600.00

And I will sublease back from IBM 13,264 net square feet, for a term of 5 years at an annual rental of:

\$ 36,000.00

With an annual rental for the entire building

During the first 5 year renewal term of:

\$ 76,600.00

During the second 5 year renewal term of:

\$ 68,600.00

During the third 5 year renewal term of:

\$ 60,600.00

ITEM IV

I will lease the entire building to IBM, with the landlord

being responsible for the maintenance, at an annual rental of: \$ 99,500.00

And I will sublease back from IBM 13,264 net square feet,

for a term of 5 years at an annual rental of:

\$ 36,000.00

With an annual rental for the entire building

During the first 5 year renewal term of:

\$ 76,600.00

During the second 5 year renewal term of:

\$ 68,600.00

During the third 5 year renewal term of:

\$ 60,600.00

ITEM V

IBM will have the right to purchase the property for the amounts specified on the following page, which will include the outstanding mortgages, in conjunction with the foregoing items. It (will, will not) be necessary for IBM to assume the outstanding mortgages. I have also indicated those instances where I would not be willing to sell the building.

Mr. Thomas F. Daly
RE: Elizabeth Sales Office
(Cranford, N. J.)

32a

<u>UPON COMPLETION</u>	<u>ITEM 1</u>	<u>ITEM 2</u>	<u>ITEM 3</u>	<u>ITEM 4</u>
During 6th Year	<u>\$1,268,000</u>	<u>\$1,268,000</u>	<u>\$1,358,000</u>	<u>\$1,358,000</u>
During 11th Year	<u>1,010,000</u>	<u>1,010,000</u>	<u>1,100,000</u>	<u>1,100,000</u>
During 16th Year	<u>825,000</u>	<u>825,000</u>	<u>920,000</u>	<u>920,000</u>
During 21st Year	<u>700,000</u>	<u>700,000</u>	<u>800,000</u>	<u>800,000</u>
During 26th Year	<u>620,000</u>	<u>620,000</u>	<u>720,000</u>	<u>720,000</u>
During 31st Year	<u>565,000</u>	<u>565,000</u>	<u>650,000</u>	<u>650,000</u>

ITEM VI

I realize that the cost for the land, building and expenses to-date, indicated in the General Conditions of the Proposal, are estimated figures and my annual rental is predicated on the amount indicated. I wish to advise that this annual rent will be adjusted as follows:

- a) Any amount in excess of the amount indicated will increase the annual rental by multiplying said amount by the following percentage:

7.8 %

- b) If the amount expended is less than the amount indicated, the difference will decrease the annual rental by multiplying said amount by the following percentage:

7. - %

This is to acknowledge that I have received, read, and thoroughly understood the information contained in your General Conditions for Proposal, dated May 23, 1963, and the information submitted is in accordance with the particulars outlined in said Conditions.

Very truly yours,

By:

Firm Name: _____


Address: _____

33a

(This page intentionally left blank.)

34a

**Exhibit C, Annexed to Affidavit of Alan J. Hruska—
Letter, Dated June 24, 1963.**

(See opposite page.) 

June 24, 1963

Mr. Manuel Koufman
1330 Deacon Street
Brookline 46, Massachusetts

RE: Elizabeth, New Jersey

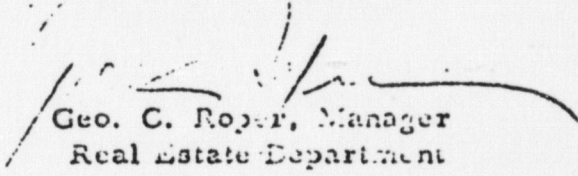
Dear Mr. Koufman:

We reviewed the bid you submitted for the above mentioned location and after careful consideration found that you were the successful bidder.

We would appreciate your contacting the architect for the job, Mr. Victor Lundy, pertaining to the plans and specifications, and to take whatever steps are necessary to secure the land for which IBM has arranged in your name. For your information the following is Mr. Lundy's firm name, address and telephone number:

Mr. Victor Lundy
Penthouse
6 East 65th Street
New York 21, New York
212 YUkon 3-3993

Very truly yours,


Geo. C. Roper, Manager
Real Estate Department

GCR:TFD:IVM

**Exhibit D, Annexed to Affidavit of Alan J. Hruska—
Pages From Deposition of Plaintiff Manuel M. Kouf-
man.**

(See opposite and following pages.) 

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letter from Mr. Roper of IEM to Mr. Koufman,
dated June 24, 1963, marked Defendant IEM's
Exhibit C for identification.)

Q I show you a document, Mr. Koufman, which has
been marked Defendant IEM Exhibit C for identification
and ask whether you recognize that document (handing to
the witness).

A Yes. This is a copy of a letter I received
from Mr. Roper.

Q That letter bears the date, does it not, of
June 24, 1963?

A It does.

Q Do you recall when you received that letter?

A Probably June 25th.

Q On the occasion that you attended the contractors'
bid opening, did that happen before or after you received
a copy of Defendant IEM Exhibit C for identification?

A I don't remember.

Q Where was the contractors' bid opening held?

A At the Waldorf.

Q What room? Do you recall?

A No.

Q Was it on the ground floor?

A No, I don't think so.

1

2

Q One of the upper floors?

3

A One of the -- a meeting hall.

4

MR. LAYTON: This is the Waldorf Astoria Hotel
we are talking about.

5

6

MR. HEMPHILL: That was my understanding of
the answer.

7

8

THE WITNESS: Yes.

9

Q How did it come about that you attended that
meeting, Mr. Koufman?

10

11

A On arrival at 425 Park Avenue on the day that
that meeting took place, Mr. Roper told me that such a
meeting was taking place and asked if I would attend.

12

13

Q Was anyone else present at that meeting that
you had with Mr. Roper?

14

15

A Mr. Daly was present.

16

17

Q Was anything else said during the course of
that conversation?

18

19

A Yes.

20

21

Q What was said by you and what was said by
Messrs. Roper and Daly?

22

23

A I said, "What do you want me to go to the meeting
for?"

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And one of them replied, "Well, we're going to
open the bids; and you being so knowledgeable about

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track of this as he read them off with the amounts.

Q Did you keep track of it on one of those forms?

A I think I did. I don't remember.

Q During the course of the bid-opening were any more bids received, other than the four which you recall having been received when you got there?

A Not to my knowledge.

Q Who were the four bidders who bid at that bid-opening?

A I only remember the name of the low bidder.

Q Who was that?

A Mahoney-Troast.

Q Was anyone there from Mahoney-Troast Company?

A It was announced that originally they had expected all the bidders to be present; then they advised all the bidders that they are not to be present, and therefore nobody else was there.

Q Who announced that?

A Mr. Lundy, I think.

Q How long did it take to open the bids?

A Opening and reading four bids took about a half hour.

Q What was the low bid?

A Well, I think -- with the contingencies that

1
2 they wanted, and there were supplementary parts and so
3 forth, I think it came to about a million six or a million
4 six fifty.

5 Q What did that bid include?

6 A I don't remember. All the requirements that
7 the architect set forth in the specifications for bid.

8 Q But you recall the total amount of the low bid
9 to be in the range of a million six hundred thousand
10 dollars to a million six hundred fifty thousand dollars;
11 is that correct?

12 A That's what I recall. Including the items
13 that he felt were mandatory.

14 Q Did you make any calculation at that time of
15 what your annual rent would be under your proposal?

16 A I did.

17 Q What was the annual rent that you calculated
18 on the basis of the low contractor's bid?

19 A Between one hundred forty-five and one hundred
20 fifty thousand dollars a year.

21 Q How did you make that calculation?

22 A I took the low bid --

23 Q What figure did you use?

24 A I think a million six I may have used.

25 I took the cost of construction as they had

1
2 realistically this can be produced in, and then that has
3 got to be interpreted into the economy as it would af-
4 fect the contractor," and it was for these reasons that
5 I felt somewhere in the neighborhood of a hundred to a
6 hundred thirty thousand dollars might be realized in
7 doing this.

8 Mr. Roper then said, "Well, we want to save all
9 the money we can because we have an intracompany problem
10 that we're not free to discuss with you. But, in short,
11 you see, if we meet certain economic factors, we can
12 prosecute this job without going to higher authority.
13 And if we can't, then all hell breaks loose because we've
14 made a gross mistake and we have to go back to higher
15 authorities. And if you could save us a couple of
16 hundred thousand dollars, that would keep us in the realm
17 of being able to make the judgment quickly ourselves and
18 prosecuting this job."

19 I said, "I can give you no assurance of a
20 couple of hundred thousand, but I would say I wouldn't
21 work on it unless I felt reasonably certain that I could
22 effect a savings of at least about a hundred thousand or
23 a hundred-some-odd thousand."

24 "How long would it take you?"

25 I said, "I don't know." I said, "This now

1

2 week and work in his office.

3

Q Did you come down the following week?

4

A Yes.

5

Q Whom did you see on that occasion?

6

A Mr. Chessa; and I think the man from the form
7 company in Portland, Oregon, was there.

8

Q Was anyone else there?

9

A Different people were in and out. I don't
10 think they were active participants in what was taking
11 place.

12

Q Did these conversations take place before or
13 after you received a copy of Defendant IFM Exhibit C for
14 identification?

15

A I think maybe some before and maybe some after.
16 I don't remember.

17

Q Mr. Koufman, you aver in paragraph 4 of the
18 complaint that on or about June 25, 1963 plaintiff and
19 IFM entered into a written contract whereby plaintiff
20 agreed to develop for IFM a tract of land in Cranford,
21 New Jersey, and to lease the building constructed on
22 said land to IFM with an option to IFM to purchase the
23 land and building, all under the terms and conditions
24 set forth in the contract.

25

Do you recall making that averment?

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A I didn't draw that; counsel drew it.

2

Q Did you know anything about that averment before the complaint was drafted?

3

4

MR. LAYTON: If you are going to ask Mr. Koufman any questions about the complaint itself, I will object. If you want to ask him the basis of his grievances against IEM, that's perfectly all right. It's a legal document you have there, Mr. Hemphill.

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MR. HEMPHILL: I'll rephrase the question.

Q Mr. Koufman, you have alleged that on or about June 25, 1963 you and IEM entered into a written contract. Was that a single document?

A No, I don't think so.

Q What documents comprise the contract made on or about June 25, 1963?

A The invitation to bid and the bid, items referred to as Exhibits 1 and 2 -- or A and B.

Q Is there anything else?

MR. LAYTON: Will you show those to the witness.

Q You have identified, have you not, Mr. Koufman, Defendant IEM Exhibit A for identification as being one of the documents you claim constitutes the contract sued

1
2 upon?

3 A Yes.

4 Q You have also identified, have you not, De-
5 fendant IBM Exhibit B for identification as one of the
6 documents comprising the written contract you are bringing
7 suit upon? Is that right?

8 A Yes.

9 Q Are there any other documents you claim com-
10 prise the contract sued upon in this lawsuit?

11 A Not to my knowledge.

12 Q Does Defendant IBM Exhibit C for identification
13 constitute one of the documents?

14 A This was stapled to it. I thought this was
15 stapled to this (indicating). You did have it stapled
16 to the documents.

17 Q I don't think I did.

18 MR. LAYTON: It's been marked separately.

19 THE WITNESS: If it's marked separately, then
20 that is included, the letter of June 24, 1963, ac-
21 knowledging --

22 Q So it is your testimony that Defendant IBM
23 Exhibit C for identification is one of the documents
24 constituting the contract upon which you are bringing
25 suit; is that correct?

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A Yes.

MR. LAYTON: The original. I'm assuming we understand that Mr. Koufman would have received the original of IIM Exhibit C for identification and that C is a carbon copy.

MR. HEMPHILL: Let the record so reflect.

Q Are there any other documents, Mr. Koufman, that you claim constitute the contract upon which you are bringing suit?

A Not to my recollection.

Q You stated, Mr. Koufman, that the meeting at the Waldorf took place on a Wednesday.

A I think so.

Q According to your recollection, And that you planned to start work about Monday or Tuesday of the following week. Is that correct?

A I think so.

Q Did there come a time when you met with Mr. Chessn and Mr. Lundy and representatives of Mahoney-Troast and discussed further the question of reducing the cost of construction?

A Yes.

Q When did that take place?

A Most of that took place in New York, at the

1
2 IEM office, but a good portion of that was handled by
3 Mr. Rubin, whom I brought down from Boston. He was
4 present at all the meetings with these people. I was
5 only present at some of them.

6 Q Can you fix an approximate date upon which
7 your first such conference took place?

8 A I think it started the week after this meeting
9 took place.

10 Q What is Mr. Rubin's first name?

11 A Richard.

12 Q Does he have a middle name?

13 A B.

14 Q By "B", do you mean middle initial?

15 A Yes.

16 Q What does the "B" stand for?

17 A I don't know.

18 Q How do you spell Mr. Rubin's last name?

19 A R-u-b-i-n.

20 MR. LAYTON: You have this already at the out-
21 set.

22 MR. HENRILL: Possibly, but I've finished
23 that particular aspect of the questioning and I'm
24 prepared to move on at this time.

25 Q What is Mr. Rubin's title in your employ, Mr.

1

2 the papers so that I could prosecute this contract.

3 Q Was that before or after the final estimated
4 cost was fixed?

5 A I think it was after.

6 Q And your recollection of the point in time that
7 the final costs were fixed after efforts to reduce costs
8 had been made occurred either in the first, second or
9 third week in August; is that correct?

10 A I think so.

11 Q Did you take any steps in June, July or August
12 to tie up the land in Cranford?

13 A I was told by Mr. Daly that it wasn't necessary
14 because they had it well in control and were not in
15 jeopardy of losing it.

16 Q When did Mr. Daly tell you that?

17 A He told me that immediately after I was noti-
18 fied that I was selected as the one with whom they would
19 enter -- whose contract they accepted.

20 Q Are you referring to Defendant IBM Exhibit C
21 for identification when you speak of that notification?

22 A My memory serves me vaguely that I was notified
23 orally that I was selected, and that this letter of June
24 24th came in after I was orally selected, in which case
25 the conversation with Daly about acquiring the land could

1
2 have taken place prior to June 24th. But, nonetheless,
3 when I was advised I had been the successful bidder, I
4 offered to take the necessary steps to buy the land; and
5 he said, "There is no rush about that. We've got it well
6 tied up."

7 Q Was there any further conversation you had with
8 Mr. Daly or anyone else at IBM with reference to your
9 taking steps to secure the land in your own name?

10 A No.

11 Q Just that one discussion with Mr. Daly shortly
12 after you had been notified that you were the successful
13 bidder or shortly after you received this June 24 letter?

14 A No, I mentioned it at one or two other occa-
15 sions. Each time, he gave me the same answer that there
16 was, in this case, no particular concern about acting on
17 the land because it was well tied up and they were not
18 in jeopardy of losing it.

19 Q Who advised you, Mr. Koufman, of the estimated
20 cost of construction after the work of cost reduction
21 had been done?

22 A Mr. Rubin.

23 Q Did you talk with Mr. Chessa about the final
24 estimated cost of construction?

25 A I think he sat in many of the meetings, and I

1

2 A I don't know.

3 Q Did IBM ever advise you of the particular item
4 in your June 5, 1963 proposal that they were interested
5 in?

6 A I was advised of that the day I arrived in
7 their office, before we went up to the opening of the
8 bids.

9 Q What item were they interested in?

10 A I.

11 Q Who told you that?

12 A Mr. Daly and Mr. Roper.

13 Q Did anyone else tell you that IBM was interested
14 in item I?


15 A Only they.

16 Q You made references to discussing with Messrs.
17 Daly and Roper the consequences of a possible change in
18 the money market. What change in the money market was
19 anticipated by you at that time?

20 A There was an imminent change that would re-
21 flect anywhere from a quarter to a half or three-quarters
22 of a point, depending on the nature of the vehicle that
23 you were dealing with.

24 Q With reference to the Cranford project, what
25 change in the money market did you anticipate during

**Exhibit E, Annexed to Affidavit of Alan J. Hruska—
Pages From Deposition of George Roper.**

(See opposite and following pages.) 

1
2 Q You didn't keep it then?

3 A I kept a calendar that had a pretty good indi-
4 cation to me and I kept a diary, but that is all long
5 since gone.

6 I don't mean a diary. I kept a log, a calendar
7 that would trigger time references and dates.

8 Q But you didn't retain this?

9 A No.

10 Q Well, you did ask for a response to this re-
11 quest for bids by June 6, 1963?

12 A Right.

13 Q Is it correct that the opening of the contrac-
14 tors' bids took place and was scheduled to take place
15 sometime after June 6, 1963? Do you recall?

16 A I am not sure. I know it did take place in
17 the plan dictated or requested by Lundy of June 19th.

18 Q June 19, 1963, that time was suggested by Lundy?

19 A I think it was.

20 Q Did you participate in any way in evaluating
21 the proposals that IDH received in response to the May
22 23, 1963 letter?

23 A Only to discuss various aspects and angles
24 with Tom Daly in his negotiation of selection.

25 Q Could you tell me, to your best ability, the

1
2 substance of your discussion with Tom Daly on receipt
3 of these proposals?

4 A Specifically, that we were interested again
5 to the simple efforts, to the development of the fast
6 buildup of a more or less recent policy of the last few
7 years, having built buildings for IBM growth, to have
8 buildings built for us that involved tenant space as a
9 growth buffer.

10 Q You mean subtenant space?

11 A That's right. Sometimes twenty-five and fifty
12 percent of the stores are built and we were building on
13 a progressive anticipated growth of the office. It had
14 to become an increasing interest to determine and make
15 plans for a program with the investors coming in on some
16 of the responsibility, subleasing the space, because it
17 was an ever-increasing burden of effort and responsibility
18 on the part of every small, little department.

19 In the case of the Cranford site, we were more
20 than others, ourselves, personally, and the department,
21 and Tom Daly, were more interested in the sublease feature
22 and the possibility of expense responsibility by the
23 investors than the average building, because Lundy's
24 designs called for a big bay middle, and space for the
25 tenants would be four corners.

1
2
3 But it wouldn't be as flexible as by a section
4 on the second and third floors.

5 So that the sublease consideration, I remember
6 discussing specifically with Tom on the basis of how
7 much that meant specifically in the Cranford project.

8 That Mr. Koufman's bid on the office involved
9 subtenants' responsibility, that in my general, ^{or} rather
10 specific material, was that thing that put him over in the
11 advantages over the second bid, to be the successful
12 bidder.

13 He was not, as I recall it, the low net, the
14 lowest net dollar bidder.

15 Q Mr. Roper, I will hand you a copy of Defendant
16 IBM's Exhibit A for identification. Could you indicate
17 to me in the attachments thereto which portions related
18 to what you just described as your interest in the sub-
19 tenant feature?

20 A It involved the issue of this lease-back space
21 for subtenants in items 3 and 4.

22 Q Could you tell me how?

23 A Yes. The investor in that item, in that option,
24 was offered to lease back at a figure to be indicated,
25 sublease back from IBM those thousands of square feet,
which in the case of Cranford were in the four corners of

1
2 the building.

3 This relieved IBM of the vicissitudes of the
4 connections of the problem of market in Cranford, the
5 future market, for the next five years.

6 Q This with a view toward the latter part of the
7 lease term, in the event IBM wanted to use less of the
8 space for itself?

9 A No. This was specified, that for this speci-
10 fied portion of square feet for a period of five years,
11 which is the period we anticipated not needing the square
12 feet, that the landlord would entirely take care of that
13 sublease problem and just take that, in effect, cost off
14 of IBM.

15 Q Are you indicating, Mr. Roper, that item 3 or
16 4 relates to the first five years of the lease?

17 A That's right.

18 Q And you were interested in learning what the
19 rental would be during the first five years, and whether
20 IBM was going to be relieved of the responsibility of
21 the rental of 13,264 net square feet?

22 A That's right.

23 Q Do you recall anything else from your discussion
24 with Mr. Daly about the proposals that came in?

25 A Only as I indicated that that was a specific

1
2 alternate that was uppermost in mind in the discussions
3 and was the major edge that one bidder gave.
4

5 As I recall, that bidder overcame some of the
6 advantages of the other bidders, at least one of which
7 was, I think, also on a net lease dollar basis.

8 Q Do you recall discussing Mr. Chesbro's bid
9 with Mr. Daly?

10 A Not specifically.

11 Q Do you recall coming to any decision with Mr.
12 Daly as to who of the bidders were going to be selected?

13 A No specific memory. I remember the conclusion
14 came and I agreed with it. I know what happened. I don't
15 remember specifically any conferences.

16 Q Was that a joint decision between you and Mr.
17 Daly and could you tell me how the decision was arrived
18 at?

19 A The decision was pretty much arrived at based
20 on an analysis of all the factors, of all the alternates,
21 and we had the advantage of alternates. It resulted in
22 a recommendation by Mr. Daly that I concurred in.

23 Q Mr. Daly made the actual recommendation?

24 A Right.

25 Q And you concurred in that?

A Yes.

1
2
3 No. 27 for identification.)

4 Q Can you identify that writing on that document?

5 A No.

6 Q Then you really have no knowledge about this
7 at all?

8 A No.

9 MR. LAYTON: Mr. Hemphill, could we get a copy
10 of the approved proposal on the Cranford project?

11 MR. HEMPHILL: I would like to take that request
12 under consideration and advise you.

13 MR. LAYTON: All right, fine.

14 Q Mr. Roper, did you attend the June 19, 1963
15 opening of the contractors' bids?

16 A Yes.

17 Q Where was that?

18 A At the Waldorf Astoria Hotel.

19 Q Do you recall whether anyone from IBM communi-
20 cated with the individual or company that was selected to
21 go ahead with the development of this project before
June 19, 1963?

22 A No.

23 Q You don't recall at all?


24 A No.

25 Q Do you know whether they did at all?

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(This page intentionally left blank.)

**Exhibit F Annexed to Affidavit of Alan J. Hruska—
1963 Equalization Table From Union County, New
Jersey.**

(See opposite page.) 

Section 54:3-18 of the Revised Statutes requires the County Board of Taxation to complete its equalization of the real property valuations in the several taxing districts before the tenth day of March. Pursuant to Section 54:3-19 of the Revised Statutes, one certified copy of such equalization table, as completed, shall be transmitted to each of the following - one to the Director, Division of Taxation; one to the Division of Tax Appeals; one to the Director, Division of Budget and Accounting; and one to each taxing district in the County.

TAXING DISTRICT	ASSESSED VALUE OF PROPERTY	RATIO OF ASSESSED TO TRUE VALUE	PERCENT-AGE BY WHICH ASSESSED VALUE SHALL BE INCREASED OR DECREASED	AMOUNT BY WHICH ASSESSED VALUE SHALL BE INCREASED OR DECREASED	AGGREGATE TRUE VALUE
Berkeley Hts.	\$ 18,906,850.	18.96	427.42	\$ 80,812,822.	\$ 99,719,672.
Clark	40,089,400.	40.74	145.45	58,313,643.	98,403,043.
Cranford	36,212,000.	24.50	308.16	111,592,081.	147,804,081.
Elizabeth	143,039,850.	31.56	216.85	310,191,613.	453,231,463.
Fanwood	19,025,550.	39.79	151.31	28,789,353.	47,814,903.
Garwood	5,755,885.	26.23	281.24	16,188,015.	21,943,900.
Hillside	56,997,800.	35.11	184.81	105,158,024.	162,055,824.
Kenilworth	12,558,750.	20.53	387.09	48,613,924.	61,172,674.
Linden	98,713,700.	22.27	223.23	344,744,204.	443,458,061.
Mountainside	21,218,250.	30.44	228.51	48,486,907.	69,705,157.
New Providence	35,429,110.	40.21	148.69	52,681,086.	88,110,196.
Plainfield	72,700,575.	31.00	222.58	161,817,408.	234,517,983.
Rahway	39,238,350.	26.48	277.64	108,942,730.	148,181,080.
Roselle	25,107,425.	25.18	297.14	74,604,330.	99,711,755.
Roselle Park	16,159,200.	24.76	303.87	49,104,127.	65,263,327.
Scotch Plains	47,580,000.	37.85	164.20	78,126,737.	125,706,737.
Springfield	48,791,300.	37.69	165.32	80,662,931.	129,454,231.
Summit	79,155,000.	37.06	169.83	134,431,076.	213,586,076.
Union	100,002,700.	22.90	336.68	336,690,313.	436,693,013.
Westfield	91,658,775.	38.69	158.46	145,246,820.	236,905,595.
Winfield	611,575.	44.50	124.71	762,750.	1,374,325.

CERTIFICATE OF COUNTY BOARD OF TAXATION


We hereby certify, this twenty-sixth day of February, 1963, that the foregoing table shows the assessed valuations of real property, the ratio of assessments to true value, the percentages by which such valuations have been increased or decreased, and the true valuations as finally determined by us for the year.

Attest:

[Signature]

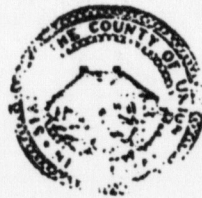
[Signature]
[Signature]
 CLERK COUNTY BOARD OF TAXATION

**Exhibit C, Annexed to Affidavit of Alan J. Hruska—
1963 Abstract of Ratables for Union County.**

(See opposite and following pages.) 

61a

ABSTRACT OF RATABLES
UNION COUNTY
1963



UNION COUNTY BOARD OF TAXATION

THOMAS L. HON, *President*

H. R. WHEELER

NEIL L. CANN

MAURICE O'KEEFE, *Secretary*



	1	2	3	4	Value of Tangible Per-			Property Assessed	(e)
					(a) Tangible Personal Property Not Used In Business (Other than Tangible Household Property and Personal Effects)	(b) Form Stock and Farm Machinery	(c) Stock Tangible Material Used Manufacture and Business Personal Property Used in Business		
1. Berkeley Heights, Town of	\$ 3,022,175.	\$ 15,884,675.	\$ 18,906,500.	\$ 3,559.	\$	\$	\$ 254,537.	\$ 2,327,553.	\$ 2,577,125.
2. Clark, Township of	10,984,900.	29,104,500.	40,089,400.	350,803.		1,400.	1,638,200.	4,411,500.	6,021,152.
3. Cranford, Township of	6,036,609	30,175,400.	36,212,030.	3,226,906.		100.	437,000.	3,161,400.	1,594,272.
4. Elizabeth, City of	37,025,850.	106,014,000.	143,039,850.	13,331.			6,617,700.	13,426,950.	20,044,652.
5. Forward, Borough of	3,789,050.	15,236,509	19,025,553.	11,798.			46,850.	1,235.	321,125.
6. Garwood, Borough of	71,870.		71,870.	43,761.			10.	4,660,200.	1,750,715.
7. Hillside, Township of	10,496,500.	10,496,500.	10,496,500.	39,633.			1,530.	392,925.	9,794,525.
8. Kenilworth, Borough of	1,726,790.	10,496,500.	12,223,290.	239,000.			20,270.	11,190,160.	25,437,524.
9. Linden, City of	12,345,508.	86,368,257.	98,713,765.				892,850.	773,175.	1,075,055.
10. Mountainside, Borough of	6,524,500.	14,693,750.	21,218,250.					1,595,900.	1,595,900.
11. New Providence, Borough of	10,760,725.	24,668,390.	35,429,115.					1,266,750.	6,685,000.
12. Plainfield, City of	18,279,775.	54,420,806.	72,700,575.	240,967.				5,594,650.	5,715,252.
13. Rahway, City of	7,232,400.	32,005,950.	39,238,350.	521,999.			2,478,300.	1,502,525.	2,279,875.
14. Roselle, Borough of	5,050,100.	20,057,325.	25,107,425.	28,089.				332,275.	517,975.
15. Roselle Park, Borough of	2,918,900.	13,240,300.	16,159,200.	58,551.			185,700.	727,200.	978,600.
16. Scotch Plains, Township of	13,676,200.	33,903,800.	47,580,000.	89.		13,300.	228,000.	1,627,100.	3,271,000.
17. Springfield, Township of	14,306,900.	34,304,400.	48,611,300.	2,826.			1,640,000.	2,539,860.	3,715,450.
18. Summit, City of	19,262,100.	59,892,900.	79,155,000.	346,012.			1,208,400.	7,590,400.	13,533,000.
19. Union, Township of	26,478,300.	73,532,500.	100,010,800.	16,846.			5,947,000.	2,520,450.	4,134,950.
20. Westfield, Town of	24,798,775.	44,860,000.	69,658,775.	4,237.			1,664,500.	5,000.	9,375.
21. Westfield, Township of	98,000.	513,575.	611,575.				437.		
Totals	\$236,069,863.	\$772,762,247.	\$1,008,825,200.	\$4,949,813.		\$18,800.	\$47,677,600.	\$65,983,515.	\$113,672,777.
Total Amount of Miscellaneous Revenues (including Surplus Revenues Appropriated for the support of the County Budget)								\$2,334,503.00	

Rate per \$100 to be applied to Col. 11 for apportionment of County Taxes \$.39245945

Taxing District	6 Deductions			7	8	9 County Equalization Table - Average Ratio of Assessed to True Value of Real Property % (R.S. 54:3-17 to R.S. 54:3-19)	10 Eq. - lization		11
	(a) Exemption of Senior Citizens (C. 9, L. 1961)	(b) Exemptions of Veterans and Widows of Veterans	(c) Total Deductions (a + b)	Net Valuation Taxable Including Second-class Railroad Property (3-4 + 5a - 6c)	General TAX RATE to Apply per \$100 Valuation		(a) Amounts Deducted Under R.S. 54:3-17 to R.S. 54:3-19	(b) Amounts Added Under R.S. 54:3-17 to R.S. 54:3-19	Net Valuation on which County Taxes are Assessed
1. Berkeley Heights, Township of	\$ 47,200.	\$ 570,500.	\$ 617,950.	\$ 20,866,025.	✓ \$13.40	18.96		80,812,822.	\$ 101,672,547.
2. Clark Township of	88,800.	944,000.	1,032,800.	45,081,309.	5.63	43.74		59,313,643.	123,294,952.
3. Cranford, Township of	286,700.	1,384,000.	1,670,700.	36,486,303.	11.35	24.50		111,592,081.	148,273,224.
4. Elizabeth, City of	1,652,650.	1,885,550.	3,538,200.	162,573,706.	10.21	31.56		310,191,613.	472,754,774.
5. Fairwood, Borough of	1,200.	562,300.	607,200.	18,751,000.	10.00	39.79		28,789,353.	47,540,759.
6. Garwood, Borough of	16,600.	241,465.	340,265.	6,898,133.	10.00	10.00		16,188,015.	23,295,145.
7. Hillside, Township of	466,800.	799,550.	1,266,350.	65,470,116.	5.40	10.00		105,158,024.	170,628,140.
8. Kenilworth, Borough of	90,133.	444,075.	534,208.	14,477,270.	9.64	20.53		48,613,924.	63,291,174.
9. Linden, City of	594,400.	1,485,200.	2,079,600.	122,359,873.	7.18	22.26		344,744,258.	467,124,171.
10. Montclair, Borough of	29,300.	393,000.	422,300.	22,461,975.	7.67	30.44		48,436,907.	70,948,922.
11. New Providence, Borough of	56,000.	640,500.	696,500.	36,330,762.	6.75	43.21		52,681,080.	89,011,343.
12. Plainfield, City of	626,800.	1,274,700.	2,056,700.	77,569,800.	10.69	31.00		161,817,478.	239,387,330.
		154,400. 800*							
13. Rahway, City of	379,900.	1,288,200.	1,668,100.	43,807,499.	10.87	26.48		108,942,730.	152,753,229.
14. Roselle, Borough of	271,300.	866,700.	1,138,000.	26,077,389.	10.46	25.18		74,604,330.	100,691,739.
15. Roselle Park, Borough of	264,700.	515,600.	780,300.	15,955,426.	11.60	24.76		49,134,127.	65,259,553.
16. Scotch Plains, Township of	129,700.	1,082,100.	1,211,800.	47,346,889.	6.78	37.85		78,126,737.	125,473,525.
17. Springfield, Township of	124,000.	770,200.	894,200.	51,170,926.	6.87	37.69		80,662,931.	131,533,957.
18. Summit, City of	209,100.	861,700.	1,070,800.	32,148,672.	6.39	37.06		134,431,076.	215,579,748.
19. Union, Township of	663,000.	2,292,400.	2,955,400.	110,597,146.	7.89	22.90		330,690,313.	447,287,457.
20. Westfield, Township of	257,600.	1,496,000.	1,753,600.	94,094,362.	6.98	38.69		41,246,820.	239,341,192.
21. Winfield, Township of		500.	500.	620,450.	38.05	44.50		62,750.	1,383,200.
Totals	\$6,382,083.	\$19,953,390.	\$26,335,473.	\$1,011,146,429.				\$2,376,100.	\$3,477,127,437.

* Full Out Shelters

Personages

17 APPORTIONMENT									
Section A County Taxes (Less Tax Due County on Bank Stock)					Section C Local Taxes to be Raised				
ADJUSTMENTS RESULTING FROM					DISTRICT SCHOOL PURPOSES				
Total County Taxes Apportioned (Including Total Net Adjustments)	(a)		(b)		Net County Taxes Apportioned	(c)			
	County Equ. (R.S. 42-37)	County Tax (R.S. 42-37)	County Tax (R.S. 42-37)	County Tax (R.S. 42-37)		As Required by District School Budget	Regional Consolidated School Budgets	As Required by Local Municipal Budget	Total Tax Levy
1,399,542.50					\$ 399,053.17	\$ 1,190,279.00	\$ 648,796.61	\$	\$ 2,794,042.80
406,285.96					401,885.45	1,154,522.08	655,843.98		2,536,629.21
581,867.56					581,230.48	2,721,803.05			4,129,030.52
1,857,730.78					1,847,671.02	719,223.74		326,101.00	16,588,340.92
186,814.84					186,499.72		753,773.82		1,315,174.98
90,716.01						262,682.00	147,302.91		718,776.12
670,475.85						1,841,753.61			4,278,427.47
247,914.12					247,726.00	443,149.85	402,693.84		1,315,354.55
1,835,465.50					1,833,633.03	3,847,145.00			8,778,643.97
278,790.54					278,300.56				1,721,935.97
349,768.18					348,316.25				2,450,740.35
940,461.97					939,073.22	4,135,392.00		359,935.91	8,289,908.93
650,225.37					599,797.70	2,200,435.00		116,345.50	4,758,540.85
395,624.51					394,894.01	1,561,480.00			2,725,694.47
255,668.48					255,102.38	1,226,115.80			1,849,532.11
493,043.15					490,052.52		1,984,923.93		3,207,004.49
510,835.40					516,283.48	1,309,281.28	840,093.81		3,514,871.15
851,040.69					851,539.30	2,357,789.00		305,721.00	5,263,977.13
1,757,996.59					1,757,132.22	4,781,100.00			8,722,827.04
940,480.75					937,767.44	4,781,826.00			6,521,999.86
5,435.22					5,435.22	190,405.00			236,057.15
13,463,142.25					\$13,625,917.14	\$42,776,007.90	\$5,897,994.00	\$1,789,462.41	\$91,777,510.37
County Taxes Apportioned					\$13,787,960.00				
Bank Stock Taxes Due County					162,042.86				
County Taxes Apportioned (Total A 11)					\$13,625,917.14				
County Taxes Apportioned (Total A 11b)					37,225.11				
County Taxes Apportioned (Including Adjustments - Total 12A 1)					\$13,663,142.25				

* Net Overpayments are added to the Net Taxes Apportioned and
Net Underpayments are deducted.

Affidavit of John H. Grady in Support of Motion.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York,
County of Westchester, ss:

JOHN H. GRADY, being duly sworn, deposes and says:

I am the Assistant Secretary of International Business Machines Corporation (IBM), and I make this affidavit in support of IBM's motion for partial summary judgment, pursuant to FRCP 56(b), dismissing the first claim asserted in the complaint herein.

Neither George Roper nor Thomas F. Daly, the IBM employees whose correspondence form the memoranda on which plaintiff relies, was ever authorized by IBM to execute or enter into any contract, lease or other instrument on behalf of IBM. Article VI, Section 1 of IBM's corporate By-laws (copy of which is annexed hereto as Exhibit 1), which was in effect at all times material to this action, provides in pertinent part as follows:

"Except as otherwise required by law or these By-laws, any contract or other instrument may be executed and delivered in the name and on behalf of the Corporation by any officer (including any assistant officer) of the Corporation; and the Board or the Executive Committee may authorize any other agent or agents to execute and deliver any contract or other instrument in the name and on behalf of the Corporation, and such authority may be general or confined to specific instances as the Board or such Committee, as the case may be, may by resolution

Affidavit of John H. Grady in Support of Motion


determine. Unless authorized by the Board or the Executive Committee or expressly permitted by these By-laws, no officer or agent or employee shall have any power or authority to bind the Corporation by any contract or engagement or to pledge its credit or to render it pecuniarily liable for any purpose or to any amount."

Neither Roper nor Daly has ever been an officer or assistant officer of IBM, nor have they ever been authorized generally or specifically by the Board of Directors, the Executive Committee or any By-law to execute or enter into any contract, lease or other instrument on behalf of IBM.

(Sworn to by John H. Grady, April 11, 1968.)

68a

**Exhibit 1, Annexed to Affidavit of John H. Grady—
By-laws of IBM.**

(See opposite page.) 

69a

IBM

BY-LAWS

Adopted April 29, 1958

As Amended through September 15, 1967

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BY-LAWS
OF
INTERNATIONAL BUSINESS
MACHINES CORPORATION

ARTICLE I

DEFINITIONS, ETC.

In these By-laws, and for all purposes hereof, unless there be something in the subject or context inconsistent therewith:

(a) "Corporation" shall mean International Business Machines Corporation.

(b) "Certificate of Incorporation" shall mean the Certificate of Incorporation as restated on May 1, 1958, together with any and all amendments thereto.

(c) "Board" shall mean the Board of Directors of the Corporation.

(d) "whole Board" shall mean all the directors then in office, other than directors on leave of absence granted by the Board.

(e) "stockholders" shall mean the stockholders of the Corporation.

(f) "Chairman of the Board", "Vice Chairman of the Board", "President", "Chairman of the Executive Committee", "Executive Vice President", "Vice President", "Treasurer", "Secretary", "Controller", "Assistant Treasurer", "Assistant Secretary", or "Assistant Controller", as the case may be, shall mean the person at any given time occupying the particular office with the Corporation.

ARTICLE II

MEETINGS OF STOCKHOLDERS

SECTION 1. *Place of Meetings.* All meetings of the stockholders of the Corporation shall be held at the principal office of the Corporation in the State of New York or at such other place either within the State of New York or outside the State of New York but within the United States as may from time to time be fixed by the Board or specified or fixed in the notices thereof.

SECTION 2. *Annual Meetings.* The annual meeting of the stockholders of the Corporation for the election of directors and for the transaction of such other business as may properly come before the meeting shall be held on the last Monday of April of each year, if not a legal holiday, or, if such Monday shall be a legal holiday, then on the next succeeding day not a legal holiday. If any annual meeting shall not be held on the day designated herein, or if the directors to be elected at such annual meeting shall not have been elected thereat or at any adjournment thereof, the Board shall forthwith call a special meeting of the stockholders for the election of directors to be held as soon thereafter as convenient and give notice thereof as provided in these By-laws in respect of the notice of an annual meeting of the stockholders. At such special meeting the stockholders may elect the directors and transact other business with the same force and effect as at an annual meeting of the stockholders duly called and held.

SECTION 3. *Special Meetings.* Special meetings of the stockholders, unless

otherwise provided by law, may be called at any time by the Chairman of the Board or the Board.

SECTION 4. *Notice of Meetings.* Notice of each meeting of the stockholders, annual or special, shall be in writing and given in the name of the Chairman of the Board or the Vice Chairman of the Board or the President or a Vice President or the Secretary or an Assistant Secretary. Such notice shall state the purpose or purposes for which the meeting is called and the date and hour when and the place where it is to be held. A copy thereof shall either be served personally upon, or sent by mail, postage prepaid, to each stockholder of record entitled to vote at such meeting, and each stockholder of record who, by reason of any action proposed to be taken at such meeting, would be entitled to have his stock appraised if such action were taken, not less than ten or more than fifty days before the day on which the meeting is called to be held. If mailed, such copy shall be directed to each stockholder at his address as it appears on the record of stockholders of the Corporation, or if he shall have filed with the Secretary a written request that notices intended for him be mailed to some other address, it shall be mailed to the address designated in such request. Nevertheless, notice of any meeting of the stockholders shall not be required to be given to any stockholder who shall waive notice thereof as hereinafter provided in Article IX of these By-laws. Except when expressly required by law, notice of any adjourned meeting of the stockholders need not be given nor shall publication of notice of any annual or special meeting thereof be required.

SECTION 5. *Quorum.* Except as otherwise provided by law, at all meetings of

the stockholders, the presence of holders of record of a majority of the outstanding shares of stock of the Corporation having voting power, in person or represented by proxy and entitled to vote thereat, shall be necessary to constitute a quorum for the transaction of business. In the absence of a quorum at any such meeting or any adjournment or adjournments thereof, a majority in voting interest of those present in person or represented by proxy and entitled to vote thereat, or, in the absence of all the stockholders, any officer entitled to preside at, or to act as secretary of, such meeting, may adjourn such meeting from time to time without further notice, other than by announcement at the meeting at which such adjournment shall be taken, until a quorum shall be present thereat. At any adjourned meeting at which a quorum shall be present any business may be transacted which might have been transacted at the meeting as originally called.

SECTION 6. Organization. At each meeting of the stockholders the Chairman of the Board or in the absence of the Chairman of the Board, the Vice Chairman of the Board, or in the absence of the Chairman of the Board and the Vice Chairman of the Board, the President, or if the Chairman of the Board, the Vice Chairman of the Board, or the President shall be absent therefrom, an Executive Vice President, or if the Chairman of the Board, the Vice Chairman of the Board, the President and all Executive Vice Presidents shall be absent therefrom, a Vice President shall act as chairman. The Secretary, or, if he shall be absent from such meeting or unable to act, the person (who shall be an Assistant Secretary, if any of them shall be present) whom the chairman of such meeting shall appoint secretary of such meeting

shall act as secretary of such meeting and keep the minutes thereof.

SECTION 7. Order of Business. The order of business at all meetings of the stockholders shall be, insofar as applicable, as follows:

1. Call to order.
2. Proof of notice of meeting or of waiver thereof.
3. Appointment of inspectors of election, if necessary.
4. Turning in of proxies.
A quorum being present,
5. Election of Directors.
6. Other business specified in the notice of the meeting.
7. Reports.
8. Unfinished business and discussion.

Any items of business not referred to in the foregoing order of business may be taken up at such time during the meeting as the chairman of the meeting shall determine.

SECTION 8. Voting. Except as otherwise provided by law, each holder of record of shares of stock of the Corporation having voting power shall be entitled at each meeting of the stockholders to one vote for every share of such stock standing in his name on the record of stockholders of the Corporation:

(a) on the date fixed pursuant to the provisions of Section 5 of Article VII of these By-laws as the record date for the determination of the stockholders who shall be entitled to vote at such meeting, or

(b) if such record date shall not have been so fixed, then at the close of business on the day next preceding the day on which notice of such meeting shall have been given, or

(c) if such record date shall not have been so fixed and if no notice of such meeting shall have been given, then at the time of the call to order of such meeting.

Any vote on stock of the Corporation at any meeting of the stockholders may be given by the stockholder of record entitled thereto in person or by proxy appointed by an instrument in writing, subscribed by such stockholder or by his attorney thereunto duly authorized and delivered to the secretary of such meeting at or prior to the time designated in the order of business for turning in proxies. At all meetings of the stockholders at which a quorum shall be present, all matters (except where otherwise provided by law, the Certificate of Incorporation or these By-laws) shall be decided by the vote of a majority in voting interest of the stockholders present in person or represented by proxy and entitled to vote thereat. Unless required by law, or determined by the chairman of the meeting to be advisable, the vote on any question need not be by ballot. On a vote by ballot, each ballot shall be signed by the stockholder voting, or by his proxy as such, if there be such proxy.

SECTION 9. *List of Stockholders.* A list, certified by the Secretary, of the stockholders of the Corporation entitled to vote shall be produced at any meeting of the stockholders upon the request of any stockholder of the Corporation. If the right to vote at any such meeting shall be challenged, the inspectors of election, or the chairman of such meeting, shall require such list to be produced at such meeting as evidence of the right of the person challenged to vote thereat, and all persons who may appear from such list to be stockholders of the Corporation entitled to vote at such meeting may vote thereat in person or

by proxy, subject to the provisions of law, the Certificate of Incorporation or these By-laws.

SECTION 10. *Inspectors of Election.* Prior to the holding of each annual or special meeting of the stockholders, two inspectors of election to serve thereat shall be appointed by the Board, or, if the Board shall not have made such appointment, by the Chairman of the Board. If there shall be a failure to appoint inspectors, or if, at any such meeting, any inspector so appointed shall be absent or shall fail to act or his office shall become vacant, the chairman of the meeting may, and at the request of a stockholder present in person and entitled to vote at such meeting shall, appoint such inspector or inspectors of election, as the case may be, to act thereat. The inspectors of election so appointed to act at any meeting of the stockholders, before entering upon the discharge of their duties, shall be sworn faithfully to execute the duties of inspectors at such meeting, with strict impartiality and according to the best of their ability, and the oath so taken shall be subscribed by them. Such inspectors of election shall take charge of the polls, and, after the voting on any question, shall make a certificate of the results of the vote taken. No director or candidate for the office of director shall act as an inspector of an election of directors. Inspectors need not be stockholders.

ARTICLE III

BOARD OF DIRECTORS

SECTION 1. *General Powers.* The business and affairs of the Corporation shall be managed by the Board. The Board may exercise all such authority and powers of the Corporation and do all

such lawful acts and things as are not by law, the Certificate of Incorporation or these By-laws, directed or required to be exercised or done by the stockholders.

SECTION 2. Number, Qualifications, Election and Term of Office. The number of directors of the Corporation shall be seventeen, but the number thereof may be increased to not more than twenty-one, or diminished to not less than nine, by amendment of these By-laws. Any decrease in the number of directors shall be effective at the time of the next succeeding annual meeting of the stockholders unless there shall be vacancies in the Board, in which case such decrease may become effective at any time prior to the next succeeding annual meeting to the extent of the number of such vacancies. All the directors shall be of full age. The Board shall have the power to adopt regulations affording newly elected directors a reasonable time after qualification during which to purchase stock of the Corporation after their designation as directors. The directors shall be elected at the annual meeting of the stockholders or at a special meeting thereof. At each meeting of the stockholders for the election of directors at which a quorum is present, the persons receiving a plurality of the votes at such election shall be elected. Each director shall hold office until the annual meeting of the stockholders which shall be held next after his election as such director and until his successor shall have been duly elected and qualified, or until his death, or until he shall have resigned as hereinafter provided in Section 10 of this Article III. Directors on leave of absence granted by the Board shall be considered to be directors in office.

SECTION 3. Place of Meetings. Meetings of the Board shall be held at the Corporation's principal office in the

State of New York or at such other place, within or without such State, as the Board may from time to time by resolution determine or as shall be specified in the notice of any such meeting.

SECTION 4. First Meeting. The Board shall meet for the purpose of organization, the election of officers and the transaction of other business, as soon as practicable after each annual meeting of the stockholders, on the same day and at the same place where such annual meeting shall be held. Notice of such meeting need not be given. Such meeting may be held at any other time or place (within or without the State of New York) which shall be specified in a notice thereof given as hereinafter provided in Section 7 of this Article III.

SECTION 5. Regular Meetings. Regular meetings of the Board shall be held at 11:45 o'clock a. m. on the last Tuesday of each month, except the month of August, or, in respect of any particular regular meeting, at such other time and date as the Chairman of the Board shall determine and as shall be specified in the notice of such meeting. If any day fixed for a regular meeting shall be a legal holiday at the place where the meeting is to be held, then the meeting which would otherwise be held on that day shall be held at the same hour on the next succeeding business day. Notice of regular meetings of the Board need not be given except as otherwise required by law or these By-laws.

SECTION 6. Special Meetings. Special meetings of the Board may be called by the Chairman of the Board.

SECTION 7. Notice of Meetings. Notice of each special meeting of the Board (and of each regular meeting for which notice shall be required) shall be given

by the Secretary as hereinafter provided in this Section 7, in which notice shall be stated the time, place (within or without the state of New York) and, if required by law or these By-laws, the purposes of such meeting. Notice of each such meeting shall be mailed, postage prepaid, to each director, addressed to him at his residence or usual place of business, by first-class mail, at least four days before the day on which such meeting is to be held, or shall be sent addressed to him at such place by telegraph, cable or wireless, or be delivered to him personally or by telephone, at least forty-eight hours before the time at which such meeting is to be held. Notice of any such meeting need not be given to any director who shall waive notice thereof as provided in Article IX of these By-laws or who shall be on leave of absence granted by the Board. Any meeting of the Board shall be a legal meeting without notice thereof having been given, if all the directors of the Corporation then in office shall be present thereat, other than directors on leave of absence granted by the Board.

SECTION 8. Quorum and Manner of Acting. A majority of the whole Board shall be present in person at any meeting of the Board in order to constitute a quorum for the transaction of business at such meeting, and, except as otherwise expressly required by law or the Certificate of Incorporation and except also as specified in Section 1, Section 5 and Section 6 of Article IV, in Section 3 of Article V and in Article XII of these By-laws, the act of a majority of the directors present at any meeting at which a quorum is present shall be the act of the Board. In the absence of a quorum at any meeting of the Board, a majority of the directors present thereat may adjourn such meeting from time to time until a quorum shall be present thereat.

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Notice of any adjourned meeting need not be given. At any adjourned meeting at which a quorum is present, any business may be transacted which might have been transacted at the meeting as originally called. The directors shall act only as a Board and the individual directors shall have no power as such.

SECTION 9. Organization. At each meeting of the Board, the Chairman of the Board, or, in the case of his absence therefrom, the Vice Chairman of the Board, or in the case of his absence therefrom, the President, or in the case of the absence of all three such persons, another director chosen by a majority of directors present, shall act as chairman of the meeting and preside thereat. The Secretary, or, if he shall be absent from such meeting, any person (who shall be an Assistant Secretary, if any of them shall be present at such meeting) appointed by the chairman, shall act as secretary of the meeting and keep the minutes thereof.

SECTION 10. Resignations. Any director of the Corporation may resign at any time by giving written notice of his resignation to the Board or the Chairman of the Board or the Secretary. Any such resignation shall take effect at the time specified therein, or, if the time when it shall become effective shall not be specified therein, then it shall take effect immediately upon its receipt; and, unless otherwise specified therein, the acceptance of such resignation shall not be necessary to make it effective.

SECTION 11. Vacancies. Any vacancy in the Board, whether arising from death, resignation, an increase in the number of directors or any other cause, may be filled by the Board or by the stockholders at the next annual meeting

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thereof or at a special meeting thereof called for the purpose.

SECTION 12. *Retirement of Directors.* The Board may prescribe a retirement policy for directors on or after reaching a certain age, provided, however, that such retirement shall not cut short the annual term for which any director shall have been elected by the stockholders.

ARTICLE IV

EXECUTIVE AND OTHER COMMITTEES

SECTION 1. *Executive Committee.* The Board, by resolution adopted by a majority of the whole Board, may designate not less than four of the directors then in office to constitute an Executive Committee, each member of which unless otherwise determined by resolution adopted by a majority of the whole Board, shall continue to be a member of such Committee until the annual meeting of the stockholders which shall be held next after his designation as a member of such Committee or until the earlier termination of his office as a director. The Chairman of the Board, the Vice Chairman of the Board, and the President shall always be designated as members of the Executive Committee. The Board may by resolution appoint one member as the Chairman of the Executive Committee who shall preside at all meetings of such Committee. In his absence, the Chairman of the Board shall preside at all such meetings. In the absence of both the Chairman of the Executive Committee and the Chairman of the Board, the Vice Chairman of the Board shall preside at all such meetings. In the absence of the Chairman of the Executive Committee and the Chairman of the Board and the Vice

Chairman of the Board, the President shall preside at all such meetings. In the absence of all four such persons, a majority of the members of the Executive Committee present shall choose a chairman to preside at such meeting. The Secretary, or, in his absence, any person (who shall be an Assistant Secretary, if any of them shall be present at such meeting) appointed by the chairman, shall act as secretary of the meeting and keep the minutes thereof.

SECTION 2. *Powers of the Executive Committee.* To the extent permitted by law, during the intervals between the meetings of the Board, the Executive Committee shall have, and may exercise, all the powers of the Board in the management of the business and affairs of the Corporation (including the power to authorize the seal of the Corporation to be affixed to all papers which may require it; but excluding the power to appoint a member of the Executive Committee) in such manner as the Executive Committee shall deem to be in the best interests of the Corporation and not inconsistent with any prior specific action of the Board. Between meetings of the Board, the officers of the Corporation shall consult with the Executive Committee as occasion requires, with a view to obtaining the approval by such Committee of decisions requiring it. An act of the Executive Committee taken within the scope of its authority shall be an act of the Board. The Executive Committee shall render in the form of minutes a report of its several acts at each regular meeting of the Board and at any other time when so directed by the Board.

SECTION 3. *Meetings of the Executive Committee.* Regular meetings of the Executive Committee shall be held at such times, on such dates and at such places

(either within or without the State of New York) as shall be fixed by resolution adopted by a majority of the Executive Committee, of which regular meetings notice need not be given, or as shall be fixed by the Chairman of the Board and specified in the notice of such meeting. Special meetings of the Executive Committee may be called by the Chairman of the Executive Committee or by the Chairman of the Board. Notice of each such special meeting of the Executive Committee (and of each regular meeting for which notice shall be required), stating the time and place thereof (either within or without the State of New York), shall be mailed, postage prepaid, to each member of the Executive Committee, addressed to him at his residence or usual place of business, by first-class mail, at least four days before the day on which such meeting is to be held, or shall be sent addressed to him at such place by telegraph, cable or wireless, or be delivered to him personally or by telephone, at least forty-eight hours before the time at which such meeting is to be held; but notice need not be given to a member of the Executive Committee who shall waive notice thereof as provided in Article IX of these By-laws, and any meeting of the Executive Committee shall be a legal meeting without any notice thereof having been given, if all the members of such Committee shall be present thereat.

SECTION 4. *Quorum and Manner of Acting of the Executive Committee.* Four members of the Executive Committee shall constitute a quorum for the transaction of business, and the act of a majority of the members of the Executive Committee present at a meeting at which a quorum shall be present shall be the act of the Executive Committee. The members of the Executive Commit-

tee shall act only as a committee and individual members shall have no power as such.

SECTION 5. *Other Committees.* The Board may, by resolution adopted by a majority of the whole Board, designate members of the Board and officers of the Corporation to constitute other committees, which shall have, and may exercise, such powers as the Board may by resolution delegate to them, and shall in each case consist of such number of directors and officers as the Board may determine; provided, however, that each such committee shall have at least three directors as members thereof and a majority of the members thereof shall be directors. Such a committee may either be constituted for a specified term or may be constituted as a standing committee which does not require annual or periodic reconstitution. A majority of all the members of any such committee may determine its action and its quorum requirements and may fix the time and place of its meetings, unless the Board shall otherwise provide.

In addition to the foregoing, the Board may, by resolution adopted by a majority of the whole Board, create a committee of indeterminate membership and duration and not subject to the limitations as to the membership, quorum and manner of meeting and acting prescribed in these By-laws, which committee, in the event of a major disaster or catastrophe or national emergency which renders the Board incapable of action by reason of the death, physical incapacity or inability to meet of some or all of its members, shall have, and may exercise all the powers of the Board in the management of the business and affairs of the Corporation (including, without limitation, the power to authorize the seal of the Corporation to be

affixed to all papers which may require it and the power to fill vacancies in the Board). An act of such committee taken within the scope of its authority shall be an act of the Board.

SECTION 1. *Changes in Committees; Resignations; Removals; Vacancies.* The Board shall have power, by resolution adopted by a majority of the whole Board, at any time to change or remove the members of, to fill vacancies in, and to discharge any committee created pursuant to these By-laws, either with or without cause. Any member of any such committee may resign at any time by giving written notice of his resignation to the Board or the Chairman of the Board or the Secretary. Such resignation shall take effect upon receipt of such notice or at any later time specified therein; and, unless otherwise specified therein, acceptance of such resignation shall not be necessary to make it effective. Any vacancy in any committee, whether arising from death, resignation, an increase in the number of committee members or any other cause, shall be filled by the Board in the manner prescribed in these By-laws for the original appointment of the members of such committee.

ARTICLE V

OFFICERS

SECTION 1. *Number and Qualifications.* The officers of the Corporation shall include the Chairman of the Board, the Vice Chairman of the Board, the President, one or more Vice Presidents (one or more of whom may be designated as Executive Vice Presidents or by other designations), the Treasurer, the Secretary and the Controller. Such officers shall be elected from time to time by the Board, each to hold office until his successor shall have been duly elected

and shall have qualified, or until his death, or until he shall have resigned as hereinafter provided in Section 2 of this Article V, or until he shall have been removed as hereinafter provided in Section 3 of this Article V. The Board may from time to time elect, or delegate to the Chairman of the Board the power to appoint such other officers (including one or more Assistant Treasurers, one or more Assistant Secretaries, and one or more Assistant Controllers) and such agents, as may be necessary or desirable for the business of the Corporation. Such other officers and agents shall have such duties and shall hold their offices for such terms as may be prescribed by the Board or by the appointing authority.

SECTION 2. *Resignations.* Any officer of the Corporation may resign at any time by giving written notice of his resignation to the Board or the Chairman of the Board or the Secretary. Any such resignation shall take effect at the time specified therein, or, if the time when it shall become effective shall not be specified therein, then it shall become effective upon its receipt; and, unless otherwise specified therein, the acceptance of such resignation shall not be necessary to make it effective.

SECTION 3. *Removal.* Any officer or agent of the Corporation may be removed, either with or without cause, at any time, by a resolution adopted by a majority of the whole Board at any meeting of the Board; provided, however, that the Board may delegate to the Chairman of the Board the power to remove any officer or agent appointed by him.

SECTION 4. *Vacancies.* A vacancy in any office, whether arising from death, resignation, removal or any other cause, may be filled for the unexpired portion of the term of office which shall be

vacant, in the manner prescribed in these By-laws for the regular election or appointment to such office.

SECTION 5. *Chairman of the Board and Vice Chairman of the Board.* The Chairman of the Board shall be the chief executive officer of the Corporation and shall have general and active supervision over the business and affairs of the Corporation and over its several officers, agents and employees, subject, however, to the control of the Board. He shall, if present, preside at each meeting of the stockholders and of the Board and shall see that all orders and resolutions of the Board are carried into effect. He shall be an ex officio member of all committees of the Board (except committees specifically empowered to fix or approve the Chairman of the Board's compensation or to grant or administer pension, retirement, bonus, option or other employee benefits in which the Chairman of the Board is eligible to participate). He may sign certificates representing shares of the stock of the Corporation pursuant to the provisions of Section 1 of Article VII of these By-laws. He may sign, execute and deliver in the name of the Corporation all deeds, mortgages, bonds, contracts or other instruments authorized by the Board, except in cases where the signing, execution or delivery thereof shall be expressly delegated by the Board or these By-laws to some other officer or agent of the Corporation or where they shall be required by law otherwise to be signed, executed and delivered, and he may affix the seal of the Corporation to any instrument which shall require it; and, in general, he shall perform all duties incident to the office of Chairman of the Board and chief executive officer and such other duties as may from time to time be assigned to him by the Board.

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The Vice Chairman of the Board shall assist the Chairman of the Board in the general and active supervision over the business and affairs of the Corporation and over its several officers, agents and employees, subject, however, to the control of the Board and the Chairman of the Board. He shall be an ex officio member of all committees of the Board (except committees specifically empowered to fix or approve the Vice Chairman's compensation or to grant or administer pension, retirement, bonus, option or other employee benefits in which the Vice Chairman is eligible to participate). He may sign certificates representing shares of the stock of the Corporation pursuant to the provisions of Section 1 of Article VII of these By-laws. He may sign, execute and deliver in the name of the Corporation all deeds, mortgages, bonds, contracts or other instruments authorized by the Board, except in cases where the signing, execution or delivery thereof shall be expressly delegated by the Board or these By-laws to some officer or agent of the Corporation or where they shall be required by law otherwise to be signed, executed and delivered, and he may affix the seal of the Corporation to any instrument which shall require it; and, in general, he shall perform all duties incident to the office of Vice Chairman of the Board and such other duties as may from time to time be assigned to him by the Board or the Chairman of the Board. He shall, in the absence or incapacity of the Chairman of the Board, perform all the duties and functions and exercise all the powers of the Chairman of the Board.

SECTION 6. *The President.* The President shall have general and active direction over the business of the Corporation and over its several officers, agents, and employees, subject, however, to the

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control of the Board through the Chairman of the Board. In the absence of the Chairman of the Board and the Vice Chairman of the Board, he shall preside at each meeting of the stockholders and of the Board and shall see that all orders and resolutions of the Board are carried into effect. He shall be an ex officio member of all committees of the Board (except committees specifically empowered to fix or approve the President's compensation or to grant or administer pension, retirement, bonus, option or other employee benefits in which the President is eligible to participate). He may sign certificates representing shares of the stock of the Corporation pursuant to the provisions of Section 1 of Article VII of these By-laws. He may sign, execute and deliver in the name of the Corporation all deeds, mortgages, bonds, contracts or other instruments authorized by the Board, except in cases where the signing, execution or delivery thereof shall be expressly delegated by the Board or these By-laws to some other officer or agent of the Corporation or where they shall be required by law otherwise to be signed, executed and delivered, and he may affix the seal of the Corporation to any instrument which shall require it; and, in general, he shall perform all duties incident to the office of President and such other duties as may from time to time be assigned to him by the Board. He shall, in the absence or incapacity of the Chairman of the Board, or of the Vice Chairman of the Board, perform all the duties and functions and exercise all of the powers of the Chairman of the Board or the Vice Chairman of the Board.

SECTION 7. Executive Vice Presidents and Vice Presidents. Each Executive Vice President shall perform all such duties as from time to time may be as-

signed to him by the Board or the Chairman of the Board or the Vice Chairman of the Board or the President. Each Vice President shall perform all such duties as from time to time may be assigned to him by the Board or the Chairman of the Board or the Vice Chairman of the Board or the President or an Executive Vice President. At the request of the President, any Executive Vice President, or, in the absence of the President or his inability to act, the Executive Vice President designated by the Chairman of the Board or the Vice Chairman of the Board, or, in their absence by the Board, or in the absence of any Executive Vice President, the Vice President designated by the President or the Chairman of the Board or the Vice Chairman of the Board or the Board shall perform the duties of the President, and when so acting, shall have the powers of and be subject to the restrictions placed upon the President in respect of the performance of such duties. Any Vice President may sign certificates representing shares of stock of the Corporation pursuant to the provisions of Section 1 of Article VII of these By-laws.

SECTION 8. The Treasurer. The Treasurer shall be the chief financial officer of the Corporation and shall:

(a) have charge and custody of, and be responsible for, all the funds and securities of the Corporation;

(b) keep full and accurate accounts of receipts and disbursements in books belonging to the Corporation;

(c) deposit all moneys and other valuables to the credit of the Corporation in such depositories as may be designated by the Board;

(d) receive, and give receipts for, moneys due and payable to the Corporation from any source whatsoever;

(e) disburse the funds of the Corporation and supervise the investment of its funds as ordered or authorized by the Board, taking proper vouchers therefor;

(f) render to the Board, whenever the Board may require, an account of all his transactions as Treasurer; and

(g) in general, perform all the duties incident to the office of Treasurer and such other duties as from time to time may be assigned to him by the Board or the Chairman of the Board or the Vice Chairman of the Board or the President or an Executive Vice President.

In case one or more Assistant Treasurers shall be appointed, the Treasurer may delegate to them the authority to perform such of his duties as he may determine.

SECTION 9. *The Secretary.* The Secretary shall:

(a) keep or cause to be kept in one or more books provided for the purpose, the minutes of all meetings of the Board, the Executive Committee and other committees of the Board and the stockholders;

(b) see that all notices are duly given in accordance with the provisions of these By-laws and as required by law;

(c) be custodian of the records and the seal of the Corporation and affix and attest the seal to all stock certificates of the Corporation and affix and attest the seal to all other documents to be executed on behalf of the Corporation under its seal;

(d) see that the books, reports, statements, certificates and other docu-

ments and records required by law to be kept and filed are properly kept and filed; and

(e) in general, perform all the duties incident to the office of Secretary and such other duties as from time to time may be assigned to him by the Board or the Chairman of the Board or the Vice Chairman of the Board or the President or an Executive Vice President.

In case one or more Assistant Secretaries shall be appointed, the Secretary may delegate to them authority to perform such of his duties as he may determine.

SECTION 10. *The Controller.* The Controller shall:

(a) have control of all the books or account of the Corporation;

(b) keep a true and accurate record of all property owned by it, of its debts and of its revenues and expenses;

(c) keep all accounting records of the Corporation (other than the accounts of receipts and disbursements and those relating to the deposits of money and other valuables of the Corporation, which shall be kept by the Treasurer);

(d) render to the Board, whenever the Board may require, an account of the financial condition of the Corporation; and

(e) in general, perform all the duties incident to the office of Controller and such other duties as from time to time may be assigned to him by the Board or the Chairman of the Board or the Vice Chairman of the Board or the President or an Executive Vice President or the Treasurer.

In case one or more Assistant Controllers shall be appointed, the Controller may delegate to them authority to perform such of his duties as he may determine.

SECTION 11. *Bonds of Officers.* If required by the Board, any officer of the Corporation shall give a bond for the faithful discharge of his duties, in such amount and with such surety or sureties as the Board may require.

SECTION 12. *Compensation.* The compensation of the officers of the Corporation shall be fixed from time to time by the Board; provided, however, that the Board may delegate to a committee the power to fix or approve the compensation of any officers or agents, and may delegate to the Chairman of the Board the power to fix the compensation of officers and agents appointed by him. An officer of the Corporation shall not be prevented from receiving compensation by reason of the fact that he is also a director of the Corporation; but any such officer who shall also be a director shall not have any vote in the determination of the amount of compensation paid to him.

ARTICLE VI

CONTRACTS, CHECKS, DRAFTS, BANK ACCOUNTS, ETC.

SECTION 1. *Execution of Contracts.* Except as otherwise required by law or these By-laws, any contract or other instrument may be executed and delivered in the name and on behalf of the Corporation by any officer (including any assistant officer) of the Corporation; and the Board or the Executive Committee may authorize any other agent or agents to execute and deliver any

contract or other instrument in the name and on behalf of the Corporation, and such authority may be general or confined to specific instances as the Board or such Committee, as the case may be, may by resolution determine. Unless authorized by the Board or the Executive Committee or expressly permitted by these By-laws, no officer or agent or employee shall have any power or authority to bind the Corporation by any contract or engagement or to pledge its credit or to render it pecuniarily liable for any purpose or to any amount.

SECTION 2. *Loans.* Unless the Board shall otherwise determine, the Chairman of the Board or the Vice Chairman of the Board or the President or any Vice President, acting together with the Treasurer or the Secretary, may effect loans and advances at any time for the Corporation from any bank, trust company or other institution, or from any firm, corporation or individual, and for such loans and advances may make, execute and deliver promissory notes, bonds or other certificates or evidences of indebtedness of the Corporation, but no officer or officers shall mortgage, pledge, hypothecate or transfer any securities or other property of the Corporation, except when authorized by resolution adopted by the Board.

SECTION 3. *Checks, Drafts, etc.* All checks, drafts, bills of exchange or other orders for the payment of money out of the funds of the Corporation, and all notes or other evidences of indebtedness of the Corporation, shall be signed in the name and on behalf of the Corporation by such persons and in such manner as shall from time to time be authorized by the Board or the Executive Committee or authorized by the Treasurer or any Assistant Treasurer, acting to

gether with either the General Manager of an operating division or a non-financial Vice President of the Corporation, which authorization may be general or confined to specific instances.

SECTION 4. *Deposits.* All funds of the Corporation not otherwise employed shall be deposited from time to time to the credit of the Corporation in such banks, trust companies or other depositaries as the Board or the Executive Committee may from time to time designate or as may be designated by any officer or officers of the Corporation to whom such power of designation may from time to time be delegated by the Board or the Executive Committee. For the purpose of deposit and for the purpose of collection for the account of the Corporation, checks, drafts and other orders for the payment of money which are payable to the order of the Corporation may be endorsed, assigned and delivered by any officer or agent of the Corporation.

SECTION 5. *General and Special Bank Accounts.* The Board or the Executive Committee may from time to time authorize the opening and keeping of general and special bank accounts with such banks, trust companies or other depositaries as the Board or the Executive Committee may designate or as may be designated by any officer or officers of the Corporation to whom such power of designation may from time to time be delegated by the Board or the Executive Committee. The Board or the Executive Committee may make such special rules and regulations with respect to such bank accounts, not inconsistent with the provisions of these By-laws, as it may deem expedient.

SECTION 6. *Indemnification.* No person shall be indemnified, except as may

be required by law, pursuant to the provisions of Article Twelfth of the Certificate of Incorporation unless the Corporation shall have been advised by independent counsel (who may be of counsel for the Corporation) that, in their opinion, the person proposed to be indemnified would not have been adjudged, in any litigation with respect to which the right of indemnification is claimed, to be liable for negligence or misconduct in the performance of his duties.

ARTICLE VII

SHARES

SECTION 1. *Stock Certificates.* Each owner of stock of the Corporation shall be entitled to have a certificate, in such form as shall be approved by the Board, certifying the number of shares of stock of the Corporation owned by him. The certificates representing shares of stock shall be signed in the name of the Corporation by the Chairman of the Board or the Vice Chairman of the Board or the President or a Vice President and by the Secretary or an Assistant Secretary and sealed with the seal of the Corporation (which seal may be a facsimile, engraved or printed); provided, however, that where any such certificate is signed by a registrar, other than the Corporation or its employee, the signatures of the Chairman of the Board, the Vice Chairman of the Board, the President, the Secretary, or Assistant Secretary, and transfer agent or a transfer clerk acting on behalf of the Corporation upon such certificates may be facsimiles, engraved or printed. In case any officer, transfer agent or transfer clerk acting on behalf of the Corporation ceases to be such officer, transfer agent, or transfer clerk before such certificates shall be issued, they

may nevertheless be issued by the Corporation with the same effect as if they were still such officer, transfer agent or transfer clerk at the date of their issue.

SECTION 2. *Books of Account and Record of Stockholders.* There shall be kept at the office of the Corporation correct books of account of all its business and transactions, minutes of the proceedings of stockholders, Board, and Executive Committee, and a book to be known as the record of stockholders, containing the names, alphabetically arranged, of all persons who are stockholders, showing for each his place of residence, the number of shares of stock held by him, and the time when he became the owner thereof. If the Corporation has a transfer agent in the State of New York, the record of stockholders may be deposited in the office of such agent or in the office of the Corporation, at the option of the Board, provided that if kept at the office of the transfer agent, there shall be posted in a conspicuous place in the office of the Corporation a statement setting forth that fact with the name and address of the transfer agent where the stock book is kept.

SECTION 3. *Transfers of Stock.* Transfers of shares of stock of the Corporation shall be made on the record of stockholders of the Corporation only upon authorization by the registered holder thereof, or by his attorney thereunto authorized by power of attorney duly executed and filed with the Secretary or with a transfer agent or transfer clerk, and on surrender of the certificate or certificates for such shares properly endorsed or accompanied by a duly executed stock transfer power and the payment of all taxes thereon. The person in whose name shares of stock shall stand on the record of stockholders of the Corporation shall be deemed the owner

thereof for all purposes as regards the Corporation. Whenever any transfers of shares shall be made for collateral security and not absolutely and written notice thereof shall be given to the Secretary or to such transfer agent or transfer clerk, such fact shall be stated in the entry of the transfer.

SECTION 4. *Regulations.* The Board may make such additional rules and regulations as it may deem expedient, not inconsistent with these By-laws, concerning the issue, transfer and registration of certificates for shares of stock of the Corporation. It may appoint, or authorize any officer or officers to appoint, one or more transfer agents or one or more transfer clerks and one or more registrars and may require all certificates of stock to bear the signature or signatures of any of them.

SECTION 5. *Fixing of Record Date.* The Board shall fix a time not exceeding fifty days prior to the date then fixed for the holding of any meeting of the stockholders or prior to the last day on which the consent or dissent of the stockholders may be effectively expressed for any purpose without a meeting, as the time as of which the stockholders entitled to notice of and to vote at such meeting or whose consent or dissent is required or may be expressed for any purpose, as the case may be, shall be determined, and all persons who were holders of record of voting stock at such time, and no others, shall be entitled to notice of and to vote at such meeting or to express their consent or dissent, as the case may be. The Board may fix a time not exceeding fifty days preceding the date fixed for the payment of any dividend or the making of any distribution or the allotment of rights to subscribe for securities of the Corporation, or for

the delivery of evidences of rights or evidences of interests arising out of any change, conversion or exchange of capital stock or other securities, as the record date for the determination of the stockholders entitled to receive any such dividend, distribution, allotment, rights or interests, and in such case only the stockholders of record at the time so fixed shall be entitled to receive such dividend, distribution, allotment, rights or interests.

SECTION 6. *Lost, Destroyed or Mutilated Certificates.* The holder of any certificate representing shares of stock of the Corporation shall immediately notify the Corporation of any loss, destruction or mutilation of such certificate, and the Corporation may issue a new certificate of stock in the place of any certificate theretofore issued by it which the owner thereof shall allege to have been lost or destroyed or which shall have been mutilated, and the Board may, in its discretion, require such owner or his legal representatives to give to the Corporation a bond in such sum, limited or unlimited, and in such form and with such surety or sureties as the Board in its absolute discretion shall determine, to indemnify the Corporation against any claim that may be made against it on account of the alleged loss or destruction of any such certificate, or the issuance of such new certificate. Anything to the contrary notwithstanding, the Board, in its absolute discretion, may refuse to issue any such new certificate, except pursuant to legal proceedings under the laws of the State of New York in such case made and provided.

SECTION 7. *Inspection of Records.* The record of stockholders and minutes of the proceedings of stockholders shall be open daily, during business hours, for inspection, within the limits and sub-

ject to the conditions and restrictions prescribed by the laws of the State of New York, by any person who shall have been a stockholder of record of the Corporation for at least six months immediately preceding his demand; or by any person holding, or thereunto in writing authorized by the holders of, at least five per centum of all of the outstanding shares of the Corporation. Persons so entitled to inspect the record of stockholders and minutes of the proceedings of stockholders may make extracts therefrom.

ARTICLE VIII

OFFICES

SECTION 1. *Principal Office.* The principal office of the Corporation shall be at such place in the Town of North Castle, County of Westchester and State of New York as the Board shall from time to time determine.

SECTION 2. *Other Offices.* The Corporation may also have an office or offices other than said principal office at such place or places, either within or without the State of New York, as the Board shall from time to time determine or the business of the Corporation may require.

ARTICLE IX

WAIVER OF NOTICE

Whenever under the provisions of any law of the State of New York, the Certificate of Incorporation or these By-laws or any resolution of the Board or any committee thereof, the Corporation or the Board or any committee thereof is authorized to take any action after

notice to the stockholders, directors or members of any such committee, or after the lapse of a prescribed period of time, such action may be taken without notice and without the lapse of any period of time, if, at any time before or after such action shall be completed, such notice or lapse of time shall be waived in writing by the person or persons entitled to said notice or entitled to participate in the action to be taken, or, in the case of a stockholder, by his attorney thereunto authorized. Attendance at a meeting requiring notice by any person or, in the case of a stockholder, by his attorney, agent or proxy, shall constitute a waiver of such notice on the part of the person so attending, or by such stockholder, as the case may be.

ARTICLE X

FISCAL YEAR

The fiscal year of the Corporation shall end on the thirty-first day of December in each year.

ARTICLE XI

SEAL

The Seal of the Corporation shall consist of two concentric circles with the IBM logotype appearing in bold face type within the inner circle and the words "International Business Machines Corporation" appearing within the outer circle.

ARTICLE XII

AMENDMENTS

These By-laws may be amended or repealed or new By-laws may be adopted by the stockholders at any annual or

special meeting, if the notice thereof mentions that amendment or repeal or the adoption of new By-laws is one of the purposes of such meeting. These By-laws, subject to the laws of the State of New York, may also be amended or repealed or new By-laws may be adopted by the affirmative vote of a majority of the whole Board given at any meeting, if the notice thereof mentions that amendment or repeal or the adoption of new By-laws is one of the purposes of such meeting; provided, however, that if any By-law regulating an impending election of directors is adopted or amended or repealed by the Board, there shall be set forth in the notice of the next meeting of the stockholders for the election of directors the By-law so adopted or amended or repealed, together with a concise statement of the changes made.

**Affidavit of Manuel M. Koufman in Opposition to
Motion.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Commonwealth of Massachusetts,
County of Norfolk,

ss.:

MANUEL M. KOUFMAN, being duly sworn, deposes and
says:

1. I reside at 184 Fisher Avenue, Brookline, Massachusetts, and I am the plaintiff in this action. I make this affidavit in opposition to the motion of defendant International Business Machines Corporation (hereinafter "IBM") for partial summary judgment, which counsel informs me has been made as this case comes close to trial.

2. I have been a developer and financier of real estate properties for many years. The two issues raised by the eleventh hour motion by IBM are false issues and would readily appear so to anyone experienced in the real estate business.

3. I am told IBM claims the agreement awarding me development of the Cranford project did not contain provision for "taxes and insurance". Counsel for IBM have omitted to inform the Court that this subject was specifically excluded by IBM from its printed request for proposal and General Conditions for Proposal. That document is annexed as Exhibit "A" to the affidavit of Alan J. Hruska on the motion, but the relevant provision is contained on the fifth page of that Exhibit and is never quoted in full by IBM. It reads as follows:

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"Taxes & Insurance: They are not to be considered in this proposal. However, responsibility for these items will be negotiated by the parties at a later date."

In other words, at the specific instruction and direction of IBM, the subject matter of taxes and insurance was not to be considered by any persons who submitted bids to them. They were not a factor in the economic considerations of making a proposal. A simple reading of the proposal demonstrates that this was to be a "net, net" lease. Any person experienced in the real estate industry understands that the cost of such items is borne by the tenant, but devices may be utilized whereby the apparent responsibility for the items may be upon the landlord who may be able to negotiate more advantageously than a large corporation with third parties. It is specious for IBM to assert that this item was in any way relevant to my selection as the developer of this property. They excluded this term from even being considered and quite properly so since it had nothing to do with the awarding of the development contract.

4. My responsibility to IBM was to supply the money necessary for purchase of the land and construction of the building and to remain as the landlord. IBM was responsible for the payment to me of a "net" rent in accordance with any of the formulae it chose. There is no question that this was the plain meaning of IBM's proposal to me, my offer to them (which included an additional formula significantly employing the term "net"—a word of art in the industry rather than IBM's usage of "maintenance") and IBM's acceptance of my offer. (Exhibits "A", "B" and "C" annexed to IBM's lawyer's affidavit.) In the industry such usage clearly means that the tenant (here IBM) is fully responsible for costs of insurance and

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taxes after occupancy. The proposal specified that IBM's standard form of lease was to be executed, which lease was known to be a "net" lease. All that the agreement left open for further discussion was the mechanism for handling payment of taxes and arranging for insurance. This is all that was meant by the provision in the request for proposal dealing with later discussions of "responsibility" for these items. There was no need to determine such an item in connection with the developer's agreement since the costs involved were nominal, involving the work of a bookkeeper or ministerial billing expense.

5. I am also informed IBM's eleventh hour motion urges that its employees who were assigned to handle this project involving millions of dollars and who headed its Eastern Region Real Estate Division were not authorized to deal with me or other developers who competed on this project. At no time was it ever suggested to me by anyone at IBM that Messrs. Daly and Roper were not acting within the scope of their authority or that their signature on a document prepared on the stationery of IBM did not speak for that company. Annexed hereto as Exhibit "1" is a copy of the original letter to me from Mr. Roper on IBM's letterhead dated June 24, 1963 (marked on pre-trial discovery as plaintiff's Exhibit "31"). Messrs. Daly and Roper were well known in the real estate industry as the operating officials for IBM's branch office construction in the Eastern Region and so represented themselves.

6. The agreement between us was complete, there were no open items necessary to be resolved. Even IBM realized this. Annexed hereto as Exhibit "2" is a copy of Mr. Daly's letter to me of August 27, 1963. (A copy of this letter was marked defendant's Exhibit "D" on pre-trial discovery.) This letter formalized IBM's breach of its agreement with me. The question of who first breached the

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contract is disputed by IBM and will have to be resolved at the trial but there is no real question that a contract existed. I call the attention of the Court to the fourth sentence of the second paragraph in Mr. Daly's letter which states:

"Therefore, in the best interests of the IBM company, we have no alternative but to *cancel our previous commitment* to you since you are unwilling to perform in accordance with the terms of your proposal *which IBM had accepted.*" (Italics added.)

7. The Court should also note that no official of IBM has submitted an affidavit in support of the merits of this motion.

8. My contract dispute with IBM is about to proceed to trial. It should be allowed to do so.

Dated: May 2, 1968.

(Sworn to by Manuel M. Koufman, May 2, 1968.)

EXHIBIT 1, ANNEXED TO AFFIDAVIT OF MANUEL KOUFMAN--
LETTER, DATED JUNE 24, 1963.

85 4/20/63 JRM

10/1/66 JRM

Data Processing Division
Eastern Regional Office
425 Park Avenue, New York 22, N.Y.

PLaza 1-6060

June 24, 1963

Mr. Manuel Koufman
1330 Beacon Street
Brookline 46, Massachusetts

RE: Elizabeth, New Jersey

Dear Mr. Koufman:

We reviewed the bid you submitted for the above mentioned location and after careful consideration found that you were the successful bidder.

We would appreciate your contacting the architect for the job, Mr. Victor Lundy, pertaining to the plans and specifications, and to take whatever steps are necessary to secure the land for which IBM has arranged in your name. For your information the following is Mr. Lundy's firm name, address and telephone number:

Mr. Victor Lundy
Penthouse
6 East 65th Street
New York 21, New York
212 YUkon 8-8993

Very truly yours,

Geo. C. Roper
Geo. C. Roper, Manager
Real Estate Department

GGR TFD:HVM

EXHIBIT 2, ANNEXED TO AFFIDAVIT OF MANUEL M. KOUFMAN--
LETTER, DATED AUGUST 27, 1963.



Data Processing Division
Eastern Regional Office
425 Park Avenue, New York 22, N.Y.

PLaza 1-6060

August 27, 1963

Mr. Manuel M. Koufman
1330 Beacon Street
Brookline 46, Massachusetts

Dear Mr. Koufman:

This is to confirm your meeting with Mr. Wright and myself in which you indicated that you would be unable to build our new Elizabeth office under the terms of your proposal. You indicated that it would be necessary for you to have an annual rental of \$132,000, and our lease would have to be extended from a 17-year lease to a 22-year lease. IBM would have the right to cancel the lease at the end of the 17th year provided it would purchase the building.

In our eyes, this proposal would necessitate a financial commitment on the part of the IBM company which is inconsistent with our present objectives in the Elizabeth area. In view of this, we found it necessary to reopen the discussion with other investors who had previously proposed to IBM but who were not initially selected. As a result of this renegotiation, we were able to secure a financial source which requires a financial commitment on the part of IBM consistent with our objectives. Therefore, in the best interests of the IBM company, we have no alternative but to cancel our previous commitment to you since you are unwilling to perform in accordance with the terms of your proposal which IBM had accepted. This is in accordance with the decision that was conveyed to you by Mr. Wright and me at our meeting last week.

We have received confirmation that the new investor will perform under his agreement with us and accordingly, we have awarded the project to him.

We wish to once again thank you for the efforts you have put forth in our behalf on this project, and we hope that you will be successful

96a

EXHIBIT 2, ANNEXED TO AFFIDAVIT OF MANUEL M. LOUFMAN
Mr. Manuel M. Koufman

August 27, 1963

-2-

in another of our ventures which you feel will be more beneficial to
you.

Very truly yours,


Thomas F. Daly, Administrator
Real Estate Department

TFD:jb

Affidavit of Robert Layton in Opposition to Motion.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York,
County of New York, ss:

ROBERT LAYTON, being duly sworn, deposes and says:

1. I am a member of the firm of Gilbert, Segall and Young, attorneys for plaintiff in this action. I am fully familiar with all prior proceedings in this action and I make this affidavit in opposition to the instant motion by defendant International Business Machines Corporation (hereinafter "IBM") for partial summary judgment made four months after this case was placed on a trial calendar of this Court and more than two years following commencement of the action.

2. Notwithstanding the assertions in the moving papers, plaintiff's first cause of action is not complex. By a writing dated May 23, 1963 IBM solicited proposals for the development of an IBM branch office in Cranford, New Jersey. (Moving affidavit, Exhibit "A".) Plaintiff submitted his written offer on June 6, 1963. (Moving affidavit, Exhibit "B".) IBM accepted plaintiff's offer by a writing dated June 24, 1963. (Moving affidavit, Exhibit "C"; Mr. Koufman's affidavit Exhibit "1".) IBM thereafter breached the agreement and this action was commenced on March 29, 1966.

3. Extensive motion practice ensued in the spring of 1966 involving issues of propriety and priority of discovery.

4. Examination of the plaintiff began April 26, 1966, and consumed four days and 528 pages of transcript. These examinations concluded on June 28, 1966.

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5. Plaintiff's examinations of defendants began December 2, 1966 and consumed nine days of testimony and 1,008 pages of transcript. These examinations concluded on November 3, 1967.

6. Additional discovery of witnesses was conducted informally by the plaintiff during the summer and early fall of 1967. This discovery had nothing to do with the contract cause of action.

7. The Note of Issue was filed on January 26, 1968. IBM raised no objection to its filing nor did it notify anyone that it intended to make any motions.

8. On March 25, 1968 the Court issued its pre-trial order directing a conference of attorneys herein by April 9, 1968 and the filing of pre-trial memoranda on or before April 19, 1968.

9. On April 15, 1968, having made no effort to meet at an attorneys conference, IBM made an application seeking an adjournment or extension of the pre-trial order date until the date of entry of this Court's order determining its motion for partial summary judgment or until October 1, 1968. That application was denied by Judge Sylvester J. Ryan, but he extended IBM's time until May 7, 1968 to file its pre-trial memorandum.

10. This motion for partial summary judgment was not served until April 15, 1968, simultaneously with its adjournment application. No motion for partial summary judgment was made either at the completion of defendant's examination of the plaintiff in late June 1966, the completion of all deposition testimony in early November 1967 or even when the Note of Issue was filed in January 1968. Rather, the motion was made only after the Court issued its pre-trial order and when it became apparent that a trial would be held in the near future.

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11. The theories propounded by IBM are astonishing. First, IBM claims that since there was no agreement as to who would pay taxes and insurance premiums there could not have been a contract. This is not the fact. I refer the Court to Mr. Koufman's affidavit. No affidavit is submitted by either Mr. Roper or Mr. Daly, the operating officials of IBM, to even claim that there was no agreement on this point.

12. I call the Court's attention to Exhibit "E" annexed to the moving affidavits where a portion of Mr. Roper's deposition testimony is reproduced. (Pages 49-50.) Mr. Roper there testifies that what was always contemplated by the request for proposal, the proposal, and the acceptance was a net lease (Roper page 50, lines 4-6).

13. Further, the proposal specifically provides that the "Standard IBM form will be used as applicable" for the lease form. Annexed hereto as Exhibit "3" is a copy of the lease for this project dated 12/23/63 entered into between defendant Benderson and IBM. After the first three pages of description of the property and of the financial numbers involved, the "Standard Form" continues at page 4, paragraph 8. Paragraph 8 provides the responsibility for payment of all real estate taxes in Benderson but IBM agrees to reimburse Benderson for all taxes paid. Similarly, paragraph 9 requires Benderson to maintain insurance on the premises but IBM agrees to reimburse Benderson for the cost of all such insurance. The "boiler-plate" of this standard "net" lease continues to require IBM to arrange for services and utilities (paragraph 10, page 5), pay for maintenance (paragraph 11, page 5-6), IBM's untrammelled right to sublet (paragraph 14, page 7), notice provisions (paragraph 19, page 11 where Benderson's address is inserted in the form), IBM's sign placement (paragraph 20, page 11) through paragraph 23 at page 12 (numbers inserted). Paragraphs 24, 25(a) through (j) and 26 are apparently

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inserted to save renumbering and the "boiler-plate" continues from paragraph 27 (page 10) to the end where Benderson's name is inserted and the lease is executed for IBM on its form signature block by H. Wisner Miller, Jr.

The IBM Standard lease form and the actual lease with Benderson support Mr. Koufman's statement that the payment of taxes and insurance is always by the prime tenant, the developer simply handling the bookkeeping and billing therefor.

14. IBM directed in its request for proposal that ministerial questions be left for a later determination. Surely this ministerial matter—left open at the direction of IBM—cannot constitute a substantial unresolved item so as to bar enforcement of the agreement. As is shown by the "Standard" net IBM lease, what was contemplated was the likelihood that the responsibility to see to it that taxes were paid and insurance obtained might be the developer's, but the economic burden was clearly agreed to be IBM's.

15. IBM's next claim on this motion for partial summary judgment is that somehow Mr. Roper, the "Manager" of IBM's real estate department and Mr. Daly, the "Administrator" of IBM's real estate department were not authorized to enter into *any* contracts on behalf of IBM (see moving affidavit of John H. Grady). This contention is most surprising in light of the fact that not only Mr. Roper but at least one of his subordinates, Mr. Chessa, in fact signed contracts for IBM in connection with this very project.

(a) In addition to Exhibit "C" to the moving affidavit where Mr. Roper, the "Manager", on behalf of IBM, accepts plaintiff's offer and instructs him to proceed to purchase the land (see also Exhibit "2" annexed to Mr. Koufman's affidavit wherein Mr. Daly, the "Adminis-

Affidavit of Robert Layton in Opposition to Motion

trator", "cancels" the prior IBM "acceptance"), annexed hereto as Exhibit "4" is a copy of a document dated April 29, 1963 by which IBM contracted with defendant Benderson Development Company, Inc. for expenditures of approximately \$200,000 in connection with the purchase of the land for this project. That letter begins "The purpose of this letter is to confirm the understanding had between Benderson Development Company, Inc. and IBM . . ." and concludes "If you are in agreement with the foregoing, kindly sign the attached copy of this letter and return it to Mr. T. F. Daly, I.B.M. Corporation, 425 Park Avenue, New York 22, New York. Very truly yours, International Business Machines Corporation, By: Geo. C. Roper, Manager Real Estate Department."

(b) Attached hereto as Exhibit "5" is a document dated July 16, 1962 which is the contract between IBM and Victor A. Lundy for the architectural services for this same project. This contract is signed for IBM by "F. J. Chessa—Design Administrator". Annexed hereto as Exhibit "6" is a copy of a portion of Mr. Chessa's examination wherein he describes his role and names his superior as George Roper.

16. Once again referring to the Benderson-IBM lease, Exhibit "3", no written authorization for Mr. Miller's signature is attached nor for the initialing (below "NB" for Nathan Benderson) for IBM on pages 1 and 3 by "RCHJr.", whom it is believed is an attorney on the staff of IBM and in no way a corporate officer. Annexed hereto as Exhibit "7" is a copy of a letter from Mr. Hruska, counsel for IBM, dated January 3, 1968, in which he advises that Mr. Miller was a Vice-President of IBM until October 29, 1963, but after that date, and at the time he signed the lease dated December 23, 1963 he was the "President of the Real Estate and Construction Division of IBM", apparently as Mr. Roper was "Manager Real

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Estate Department", Mr. Daly was "Administrator Real Estate Department" and Mr. Chessa was "Design Administrator".

17. Perhaps Roper, the "Manager", Daly, the "Administrator", and Chessa, the "Design Administrator", had no formal, signed and sealed authority from the Board of Directors of this publicly held corporation to enter into any contracts, but no one at IBM even mentioned this to plaintiff and the fact is that they certainly did enter into contracts. Their apparent authority to bind IBM was overwhelmingly demonstrated by their actions and is manifested by the documents for this project. Keeping in mind the way it has conducted business, IBM's attempt to hide behind its own by-laws comes with ill grace and less merit. In any event, if IBM seriously claims lack of authority is an issue in this lawsuit—which it is doubtful it will do at trial—that is a question of fact and proof would have to be heard to determine whether or not Roper, Daly, Chessa and company did bind IBM in these circumstances and act with apparent authority.

18. Lastly, IBM suggests that the contract was incomplete in an additional, ephemeral way, pointing to a lack of designation as to which particular proposal IBM accepted. Annexed hereto as Exhibit "8" is a document (marked plaintiff's Exhibit "27" at the depositions) which Mr. Daly testified he prepared to compare the developer's proposals. (Annexed hereto as Exhibit "9" are copies of pages 105 through 108 of Mr. Daly's deposition testimony.) No blanks appear on the plaintiff's line and a large check mark appears next to Item I on plaintiff's proposal, indicating IBM's acceptance of proposal Item I.

19. In any event, even had there been no designation of the Item selected, there would still be a contract. That contract provided an option in IBM to select one of the

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items in the proposal and would require plaintiff to proceed with financing the land purchase and construction as stated in Mr. Roper's letter of acceptance. Certainly the purpose of Mr. Roper's letter is clear—to make a formal contract and start running the thirty day period within which plaintiff was required to purchase the land. (See Exhibit "A" to the moving affidavit, second page under "Option to Purchase".)

20. No purpose is served by this motion other than to attempt to delay a trial herein until the Fall Term of this Court. The time of this Court is not conserved by considering this motion for partial summary judgment, since the remainder of the action proceeds to trial in any event, and the trial judge, on hearing the testimony is in the best position to rule on any questions of law. For all the reasons set forth in this affidavit, the affidavit of Manuel M. Koufman and the memorandum of law submitted herewith, plaintiff respectfully asks the Court to expeditiously deny IBM's motion for partial summary judgment so that this matter can proceed to trial.

(Sworn to by Robert Layton, May 2, 1968.)

**Exhibit 3, Annexed to Affidavit of Robert Layton—
Agreement, Dated December 23, 1963.**

THIS AGREEMENT, made and entered into this 23rd day of December, 1963, by and between Benderson Development Company, Inc., a New York corporation with its offices at 135 Delaware Avenue, Buffalo, New York, hereinafter called "Lessor", and International Business Machines Corporation, a New York corporation having its principal office at 590 Madison Avenue, City, County and State of New York, hereinafter called "Lessee".

WITNESSETH:

Lessor by these presents leases and demises unto Lessee, and Lessee accepts and leases of and from Lessor, the following described real estate situate, lying and being in the Township of Cranford, County of Union and State of New Jersey, and being more particularly described as follows:

BEGINNING at the corner formed by the intersection of the southwesterly line of Cleary Avenue and the northwesterly line of Jackson Street (formerly Roosevelt Street), and running: thence (1) south 51 degrees 55 minutes 20 seconds west along said northwesterly line of Jackson Street a distance of 755.41 feet to a point in the easterly right-of-way line of the Garden State Parkway, Route 4, thence (2) north 21 degrees 39 minutes 15 seconds east and along said easterly line of the Garden State Parkway Route 4, a distance of 83.72 feet to a point; thence (3) north 19 degrees 34 minutes 06 seconds west and still along said easterly line of the Garden State Parkway Route 4, a distance of 72.76 feet to a point; thence (4) north 51 degrees 55 minutes 20 seconds east a distance of 30.00 feet to a point in the center line of Coleman Avenue; thence (5) north 38 degrees 04

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minutes 40 seconds west and along said center line of Coleman Avenue a distance of 89.61 feet to a point in the easterly right-of-way line of the Garden State Parkway, Route 4; thence (6) north 19 degrees 34 minutes 06 seconds west and along said easterly line of the Garden State Parkway, Route 4, a distance of 21.57 feet to a point; thence (7) north 12 degrees 16 minutes 04 seconds east and still along said easterly line of the Garden State Parkway Route 4 a distance of 13.69 feet to a point; thence (8) north 51 degrees 55 minutes 20 seconds east and along the center line of Cleveland Street a distance of 42.61 feet to a point; thence (9) north 38 degrees 04 minutes 40 seconds west a distance of 35.32 feet to a point in the easterly right-of-way line of the Garden State Parkway Route 4; thence (10) north 12 degrees 16 minutes 04 seconds east and along said easterly line of the Garden State Parkway Route 4, a distance of 148.37 feet to a point; thence (11) north 51 degrees 55 minutes 20 second east a distance of 15.77 feet to a point; thence (12) north 38 degrees 04 minutes 40 seconds west a distance of 12.44 feet to a point in the easterly right-of-way line of the Garden State Parkway Route 4; thence (13) northerly along a curve to the left having a radius of 6150.00 feet, being also along said easterly line of the Garden State Parkway Route 4, an arc distance of 210.63 feet to a point; thence (14) north 51 degrees 55 minutes 20 seconds east and along the center line of Harrison Street a distance of 45.21 feet to a point; thence (15) north 38 degrees 04 minutes 40 seconds west a distance of 31.54 feet to a point in the easterly right-of-way line of the Garden State Parkway Route 4; thence (16) northerly along a curve to the left having a radius of 6150.00 feet, being also

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along said easterly line of the Garden State Parkway Route 4, an arc distance of 166.97 feet to a point; thence (17) north 51 degrees 55 minutes 20 seconds east a distance of 85.15 feet to a point in the aforementioned southwesterly line of Cleary Avenue; thence (18) south 38 degrees 04 minutes 40 seconds east and along said southwesterly line of Cleary Avenue a distance of 620.00 feet to the aforesaid northwesterly line of Jackson Street and the Place of Beginning.

This Lease is granted and accepted upon the following terms, covenants and conditions, and the Lessor and Lessee hereby agree to keep and perform all the terms, covenants and conditions hereof on its part to be kept and performed:

1. The Lessor covenants that the premises may be used for offices, sales, storage, display, engineering services and repair of products and equipment, training purposes, parking of cars, and all purposes incidental and related thereto.

2. The Lessor covenants as a condition of the Lease that it has good marketable title to the premises and the right to make this Lease for the term hereinafter set forth; that it will deliver possession of the premises to the Lessee at the commencement of the term; and that the premises may lawfully be used by the Lessee for the uses hereinabove expressed.

3. The Lessor agrees to cause to be erected at Lessor's sole cost and expense a one-story, air-conditioned building having an area of approximately 51,392 gross square feet, including 7,000 gross square feet in the basement, and other improvements on the premises, together with a parking lot for at least 150 cars, with means of access to said lot at all times, all for the exclusive use of Lessee. Said building and other improvements shall

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be constructed in accordance with the plans and specifications prepared by Lessor's architect, which plans and specifications have been initialled by both Lessor and Lessee and marked Exhibit "A", said Exhibit "A" being attached thereto and made a part hereof.

Such building and other improvements shall be constructed in a good workmanlike manner and in accordance with all applicable laws, ordinances and regulations and substantially in conformity with said plans and specifications for said building and other improvements.

4. The lease term shall be for twenty (20) years and shall commence fifteen (15) days after the building is completed (in accordance with the plans and specifications, Exhibit "A") as certified to by Lessor's architect and accepted by Lessee, which acceptance shall not be unreasonably withheld or delayed. If the term commences on a day other than the first of the month, rent for that month shall be pro-rated at the rate of 1/30th of the monthly rent for each day of occupancy, and in such case, the term of the lease shall expire twenty (20) years from the last day of the calendar month in which the term commenced. Lessor shall construct and complete the building with all due diligence and in any event not later than July 1, 1965, subject to conditions beyond Lessor's control.

5. Lessee shall pay the annual rental of One Hundred Twenty-Eight Thousand Dollars (\$128,000.00), in monthly installments of Ten Thousand Six Hundred Sixty-Six Dollars and Sixty-seven Cents (\$10,666.67), payable on the first day of every calendar month during the term hereof.

6. The annual rental referred to in Paragraph 5 above is based upon an estimated cost of construction in the sum of \$1,412,131.00. If the cost of construction exceeds the amount of \$1,412,131.00, due solely to changes to

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the plans and specifications, Exhibit "A", requested by Lessee to Lessor in writing and reviewed and approved by the architect, said excess shall be paid by Lessee to Lessor or to Lessor's contractor, with Lessor's written approval, in cash. It is understood and agreed between the parties hereto that the "cost of construction" shall be deemed to mean architect's fees and actual construction costs incurred by and paid for by Lessor. It is further understood and agreed that the "cost of construction" shall not include interim financing during construction, builder's risk and completion bonds, legal fees, taxes during construction, and all other fees and costs incurred by Lessor as an incident to the acquisition of the land and completion of the building. It is agreed, however, that should construction be delayed, because of Lessee's failure to provide acceptable plans and specifications, or through other fault of Lessee that interest on interim financing; taxes and other expenses of Lessor caused by such delay, shall be added to the cost of construction" as such expenses may be increased because of such delay.

7. All payments to be made by Lessee under the terms of this Lease shall be made to the Lessor at 135 Delaware Avenue, Buffalo 2, New York, or to such other person or at such other place as the Lessor may designate in writing.

8. The Lessor agrees to pay promptly at all times during the term of this Lease and any extended term hereof all real estate taxes, assessments and other charges (hereinafter collectively referred to as "taxes") levied against the leased premises. However, Lessee agrees to reimburse Lessor during the term of this Lease and any extended term hereof for all taxes levied against the leased premises and paid by Lessor. The term "taxes", however, shall not include any franchise, excise, corporate, estate, inheritance, succession, devolution, trans-

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fer, gift, capital stock or income tax or tax of a similar nature which is or may become payable by Lessor or which may be imposed against Lessor or against the rents payable hereunder or upon the income or profits of Lessor by reason of any law now in force or hereafter enacted.

Any taxes for any tax year or portion thereof, not entirely within the term herein granted shall be apportioned between Lessor and Lessee so that Lessee shall pay only those taxes which correspond with the part of such tax year or portion thereof as is within the term herein granted.

Lessee shall have the right to request Lessor to contest, or Lessee may contest in its own name, by appropriate proceedings or in any other manner permitted by law, at Lessee's sole cost and expense, any taxes Lessor is required to pay hereunder, or any assessments, and Lessor agrees to diligently contest the same. Lessor shall notify Lessee immediately in the event of any change in tax assessments affecting the leased premises.

9. Lessor shall maintain insurance, in the names of Lessor and Lessee as their interest may appear, covering the building and premises in an amount equal to at least 90% of the full insurable cost thereof exclusive of excavations and foundations, against loss or damage by fire and the perils specified in the standard extended coverage endorsement; and in case of damage or destruction to the premises or building by fire or any of said perils, whether or not attributable to the negligence of Lessee or its agents, visitors, servants or employees, Paragraph 15 shall control and Lessee shall have no liability to Lessor or its insurer or insurers. However, Lessee agrees to reimburse Lessor for the cost of obtaining such insurance during the term of this Lease or any extended term hereof. The full insurable value of the premises, excluding foundations and excava-

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tions, shall be determined at three-year intervals by an Engineer designated by Lessor and approved by Lessee, which determination may be made by the Engineering Department of the insurance carrier then furnishing the insurance. If at any time during the term of this Lease, Lessee shall be able to purchase and/or provide such insurance in terms reasonably satisfactory to the Lessor and at a cost less than that which Lessor has paid for substantially equivalent insurance coverage, Lessor shall authorize the Lessee to either withhold from Lessor the difference in premium cost or authorize Lessee to furnish such insurance at the reduced cost.

The Lessee further agrees to carry and pay for public liability insurance, naming the Lessor as an additional insured, with limits of not less than One Hundred Thousand Dollars (\$100,000.00) for injury or death to one person, and not less than Three Hundred Thousand Dollars (\$300,000.00) for injuries or death to more than one person in one accident, and of not less than One Hundred Thousand Dollars (\$100,000.00) in respect of property damage.

All policies of insurance provided for herein shall be issued or written by a responsible insurance company satisfactory to Lessor and authorized to do business in the State of New Jersey. Each such policy or certificate therefor issued by the insurer shall contain an agreement by the insurer that such policy shall not be cancelled, modified or amended without at least ten (10) days' prior written notice to the Lessor. Any renewal policies or certificates of insurance shall be delivered to the Lessor at least ten (10) days prior to the expiration of any other policy covering the same risk. Such insurance may, at Lessee's election, be carried under any general blanket coverage of Lessee, provided, however, that lessee shall deliver to Lessor certificates of such insurance in form reasonably satisfactory to Lessor after issuance of said certificates and shall deliver to Lessor proof of renewal

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of such insurance not less than ten (10) days prior to the expiration of any policy.

10. The Lessee agrees to procure, at Lessee's expense, such services and utilities as the Lessee desires, and the Lessee will pay promptly all charges therefor and will not permit the same to accrue against the Lessor or the leased premises.

11. During the term of this Lease, the Lessee shall, at its sole cost and expense, maintain the leased premises and make repairs thereto and replacements thereof so that the leased premises continue in the same repair and operating condition as at the beginning of the term of this Lease, ordinary wear and tear and obsolescence excepted (subject, however to Paragraphs 15 and 18 hereof).

The Lessor shall not be required to furnish any services or facilities to, or to make any repairs to or replacements or alterations of, the leased premises.

12. The Lessor shall have the right at reasonable times to inspect the premises, except that Lessor agrees to disturb Lessee's use and occupancy as little as possible. The Lessor may make any repairs which the Lessor determines are reasonably necessary for the protection and maintenance of the premises if the Lessee fails to commence such repairs within thirty (30) days after notice from the Lessor (except those repairs caused by wear and tear, Lessor's negligence, fire and other casualty covered under the fire insurance with extended coverage required under this Lease), unless emergency conditions require immediate commencement and Lessee has failed to commence such repairs promptly, whereupon Lessee, at the completion of such work by Lessor, shall pay Lessor promptly for any expenditures incurred by Lessor for such work or repairs which are the responsibility of Lessee under this Lease.

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13. All fixtures, machinery and equipment, which are necessary to the general operation and maintenance of the leased premises, shall be the property of the Lessor whether owned by the Lessor at the commencement of the term, subsequently purchased by the Lessor, or purchased by the Lessee in accordance with the provisions of this Lease. All lighting fixtures, heating equipment, and air-conditioning equipment shall be considered necessary to the general operation and maintenance of the premises. The Lessee may place such temporary partitions, fixtures (including lighting fixtures), personal property, machinery, motors and the like, in the leased premises and may make such improvement and alterations in the interior and exterior thereof as it may desire at its own expense. All such things, except lighting fixtures, shall remain the property of the Lessee, and in case of damage or destruction thereto by fire or other causes, the Lessee shall have the right to recover as its own loss from any insurance company with which it has insured the same, notwithstanding the fact that any of such things might or could be considered to be a part of the leased premises. The Lessee may remove all or any of such things prior to or at the expiration of this Lease. It is agreed that only an express abandonment in writing shall affect the Lessee's ownership of any such things, except that, notwithstanding the foregoing provisions, the Lessee shall be deemed to have abandoned the same to the Lessor at the end or other expiration of the term by vacating the premises without removing the same. In the event of the removal of such things or any of them, the Lessee shall not be required to remove pipes, wires and the like from the walls, ceilings or floors, provided that the Lessee properly cuts, caps and disconnects such pipes and wires and seals them off, if necessary, in a safe and lawful manner. However, any special work, machinery or equipment which is not

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adapted particularly to any general office usage, herein-after installed in the leased premises by Lessee, shall be removed by the Lessee at the termination of this Lease, provided Lessor, after submission of plans by Lessee showing the special work, machinery or equipment installed by Lessee, notifies Lessee in writing within thirty (30) days after receipt of such plans that said special work, machinery or equipment must be removed at the termination of the Lease. If Lessor does not so notify Lessee within the time specified, Lessee shall have the right to abandon such special work, machinery or equipment at the termination of the Lease. Lessee may make any structural alterations to the building, at Lessee's expense, provided that such structural alterations will not change the character of the building or its adaptability for use as an office building.

14. The Lessee may assign this Lease or sublet all or any part of the premises at any time covered hereby without the prior written consent of the Lessor. In any event, the Lessee shall remain responsible for the faithful performance of all of the covenants, terms and conditions hereof on the Lessee's part to be performed.

15. It is further understood and agreed by the parties hereto that if any portion of the leased premises shall be destroyed or damaged from any cause for which sufficient insurance is then in force to defray the cost of repair, restoration or reconstruction thereof, the Lessor shall, upon collection of the proceeds of said insurance, forthwith repair, restore or rebuild the same with all reasonable dispatch, unless the cost of repair, restoration or reconstruction shall exceed the insurance proceeds, in which event the Lessor shall have the option to terminate this Lease or to repair and restore the premises. The Lessor's option under this provision shall be exercised in writing not later than sixty (60) days

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following the date of any such damage or destruction to the premises. In the event of failure of the Lessor to give notice of its election hereunder, the Lessor shall be required to repair and restore said premises and this Lease instrument shall remain in full force and effect. However, if Lessor elects to terminate as provided in this paragraph, Lessee shall have the right to notify Lessor, in writing, within sixty (60) days following receipt of the notice of termination from Lessor, that Lessee will repair, restore or reconstruct said premises, whereupon Lessor's notice of termination shall be void and of no effect. Lessor shall, immediately upon collection of the insurance proceeds, turn over said proceeds in their entirety to Lessee. Any difference in the cost of repair or reconstruction and the amount of the insurance proceeds shall be borne by Lessee.

The Lessee shall be entitled to an abatement of rental for the period during which the premises are rendered untenable or incapable of use for the purpose for which the same are at the time of such damage being used. If a part only of the premises is rendered untenable or incapable of use, the rental shall be reduced in the proportion which the floor area of said part of the premises bears to the floor area of the entire premises. Notwithstanding anything to the contrary herein, if, at any time after the sixteenth (16th) year of this Lease, a portion of the premises shall be so destroyed or so damaged that in Lessee's opinion, said premises cannot be used by Lessee for its purposes, then in that event, Lessee's opinion shall have the option to terminate this Lease upon notice in writing to Lessor within sixty (60) days following the date of such destruction or damage to the premises.

If the damage shall be so extensive as to constitute a total destruction of the building, both the Lessor and the Lessee shall have the option of terminating this Lease upon sixty (60) days' written notice to the other

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party. If neither the Lessor nor the Lessee exercises this option to terminate, the Lessor shall forthwith rebuild the same with all reasonable dispatch. In the event that this Lease terminates or is terminated, rental shall be apportioned and paid in full to the date of such termination, and all prepaid rental shall forthwith be repaid by the Lessor to the Lessee, and all insurance proceeds shall be paid to the mortgagee or to the Lessor subject only to the provisions relating to Lessee's personal property as defined in Paragraph 13 above.

16. If the Lessee remains in the premises beyond the expiration date of this Lease, as it may have been extended or renewed, such holding over in itself shall not constitute a renewal or extension of this Lease, but in such event a tenancy from month to month shall arise, subject to a payment of the same rental by the Lessee each month as that payable on account of the last month of the demised term.

17. The Lessee, on paying the said rental and performing the covenants of this Lease on its part to be performed, shall and may peaceably and quietly have, hold and enjoy the demised premises for the term aforesaid and any extension or renewal thereof.

18. In the event that all or part of the demised premises are taken by eminent domain for a public or quasi public use or purpose, or for change of grade or street widening, it is agreed as follows:

(a) If all of the premises are so taken or if such substantial material part or parts of the building on the premises are so taken that, in the reasonable opinion of the Lessee, it cannot be restored for the uses of the Lessee as set forth in Paragraph 1 of this Lease within a reasonable length of time, then this Lease shall terminate as of the date possession is taken by the condemning authority, and the rent herein reserved shall be appor-

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tioned and paid in full to that date and all prepaid rent shall forthwith be repaid by Lessor to Lessee and neither party hereto shall be liable to the other for rent, damage or otherwise for or by reason of any matter or thing occurring thereafter.

(b) If this Lease not terminate in accordance with subparagraph (a) above, the Lessor covenants to promptly restore the building and improvements to their original condition to a size as nearly comparable to the size of the original building as possible, using all due diligence. However, if Lessor shall fail promptly to proceed with and complete such repairs, Lessee may make such repairs, or so much thereof as shall be reasonably required thoroughly to protect the demised premises, to restore the same as nearly as may be to their former condition and to fit them for business purposes, for the account and at the expense of the Lessor, and Lessor will, upon receipt of a statement of the cost of such repairs from Lessee reimburse Lessee for all expenditures reasonably made by it in making the same and in default of such reimbursement Lessee may deduct the amount of such expenditures from the rent due or to come due hereunder. After such taking, rent shall abate for the period and to the extent that the premises are untenable, and after restoration of the bulding and improvements, rent shall abate in accordance with the percentage of net usable square feet of building space taken but not restored.

(c) If a part only of the demised premises shall be so taken or condemned, and, in the Lessee's opinion, the remaining portion of the premises shall be adequate and suitable for use by it for business purposes, then, at Lessee's option to be exercised by written notice given to Lessor not later than forty-five (45) days after the date possession of the part so taken or condemned shall be taken by the condemnor, this Lease shall continue in

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full force and effect except that the rent herein reserved shall be diminished in the proportion that the floor area of the part taken or condemned shall bear to the total floor area of the premises immediately prior to such taking. In such case, the lessor shall, at its own expense, as speedily as circumstances permit, repair such damage to the demised premises and the building as shall have been caused by such partial condemnation and taking; provided, however, that if the Lessor shall fail promptly to proceed with and complete such repairs, the Lessee may make such repairs, or so much thereof as shall be reasonably required thoroughly to protect the demised premises, to restore the same as nearly as may be to their former condition and to fit them for business purposes, for the account and the expense of the Lessor, and the Lessor will, upon receipt of a statement of the cost of such repairs from the Lessee, reimburse Lessee for all expenditures reasonably made by it in making the same and in default of such reimbursement the Lessee may deduct the amount of such expenditures from the rent due or to come due hereunder. If the Lessee shall exercise its option to continue this Lease, during the period of restoration and repairs, the rent shall be abated for the period and to the extent that the premises may be untenable or incapable of use by Lessee. If all of or part of the premises are taken or condemned for a period less than the balance of the term of the Lease as it may be extended, then, at Lessee's option to be exercised not later than forty-five (45) days after the date possession is taken by the condemnor, this Lease shall continue in full force and effect.

If any part of the parking area on the leased premises is taken or built upon and not restored, then lessor shall provide parking comparable to the area so condemned or taken in an area reasonably adjacent to the leased premises, at Lessor's sole cost and expense, or, if such park-

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ing space shall not be available, rent shall abate by the then fair market value of the parking area not restored.

However, nothing herein contained shall be deemed to prevent Lessee, at its own cost and expense, from participating in any proceedings commenced against Lessor, for the condemnation of all or a part of the building of which the demised premises form a part. Lessee shall have the right to participate proportionately with Lessor in any award made in such condemnation proceedings, to the extent that any expenditures by Lessee may have resulted in capital improvement to the building, and as the same may be reflected in any such award.

19. In every case, when under the provisions of this Lease it shall be necessary or desirable for the Lessee to serve any notice or demand on the Lessor, such notice or demand shall be served personally or by registered mail addressed to the Lessor at 135 Delaware Avenue, Buffalo 2, New York, until otherwise directed in writing by the Lessor, and any such notice or demand to be given to the Lessee shall be served personally, or by registered mail addressed to the Lessee's Administration Manager at the leased premises and copies of such notice shall be served simultaneously by registered mail on the Lessee at 112 East Post Road, White Plains, New York, Att: Field Real Estate Department and at 425 Park Avenue, New York 22, New York, Att: Real Estate Administrator, until otherwise directed in writing by the Lessee.

20. The Lessee shall have the privilege of placing on the premises or attaching to the exterior of the building its standard IBM sign. No other signs may be maintained in or on the premises or building without the prior written consent of the Lessee.

21. If the Lessee shall default in the performance of any of its obligations pursuant to this Lease, and if such default shall continue for thirty (30) days after written

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notice there of by the Lessor to the Lessee (except that if the Lessee cannot cure any such default within said thirty-day period, said period shall be extended for a reasonable additional period, provided that the Lessee commences to cure such default within said thirty-day period and proceeds diligently thereafter to effect such cure), or if the Lessee shall be adjudicated bankrupt or insolvent according to law, or shall make an assignment for the benefit of creditors, then and in any of said cases, the Lessor may lawfully enter into and upon said premises or any part thereof in the name of the whole, and repossess the same as of the former estate of the Lessor and expel the Lessee and those claiming under the Lessee without being deemed guilty of any manner of trespass and without prejudice to any remedies which might otherwise be used for arrears of rent or proceeding breach of covenant, and upon entry as aforesaid, this Lease shall terminate and the Lessee covenants that in case of such termination, it will indemnify the Lessor against all unavoidable loss of rent which the Lessor may incur by reason of such termination during the residue of the term above specified.

Termination of this Lease by the Lessor shall not be a waiver, release or discharge of any obligation or liability of the Lessee hereunder, and any sum payable by Lessee to Lessor, as rent or otherwise, which shall not have been paid when due shall bear interest at the rate of six per cent (6%) per annum from the date the same should have been paid by Lessee until the same shall be paid by the Lessee.

22. The Lessor covenants that the Lessee shall not be liable for any loss or damage to any person or property resulting from any act or failure to act by the Lessor during the construction of said building.

23. Lessee may, at its option, extend the term of this Lease for three (3) additional successive five (5)

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year terms, upon the same terms and conditions except that the annual rental during the third five-year term shall be \$102,400.00. Lessee shall give written notice to the Lessor, in the manner herein provided, of its intention to extend, in each case at least six (6) months prior to the end of each term, and thereupon the term of this Lease shall be so extended without any further action by either party. Said options to extend the term of this Lease shall be effective as to all premises covered by this Lease in the building or on adjoining premises which may at such time or times be under lease to Lessee.

24. Lessee may, at its option, cancel this Lease at the expiration of the seventeenth (17th) year of this Lease by giving ninety (90) day's written notice to the Lessor of its intention to so terminate prior to the commencement date of the eighth (8th) year of this Lease. In the event that Lessee exercises this option, the annual rental of \$128,000 payable by Lessee to Lessor shall be increased an additional \$13,000 from the eighth through the seventeenth years, so that the annual rental during this period shall be \$141,000, payable in equal monthly installments of \$11,750.00.

Lessee may, at its option, purchase the demised premises, together with all improvements then located thereon for the sum of \$1,700,000.00. This option shall be exercised by Lessee's giving written notice to Lessor of its intention to purchase at any time during the first ninety (90) days of the eighth year of this Lease. Conveyance shall be made at the Lessee's office upon such date as may be specified in such notice, not earlier than twenty (20) days nor later than one hundred twenty (120) days thereafter. Paragraphs 25(d), (e), (f), (g), (h) and (i) of this Lease shall be applicable in the event Lessee exercises this option. The deed shall be delivered and the purchase price paid, in cash, on the date fixed for conveyance. Lessor may use the purchase money or any por-

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tion thereof to clear the title of any encumbrances. If, prior to exercise of this option, a portion of the premises has been taken on condemnation or eminent domain, the purchase price shall be reduced by the amount of the award received by Lessor for such taking.

If Lessor shall be unable to give title or to make conveyance as stipulated, Lessor agrees to reimburse Lessee for all costs incurred in examining title, including but not limited to the cost of any survey, and upon such refund and payment being made, all obligations of either party under this paragraph shall cease and be void without recourse to either party, provided, however, (a) if, on the date fixed above for conveyance, a period of thirty (30) days shall not have expired after notice from Lessee of defect in title, the time for performance shall, if either party so elects, be extended for the purpose of curing such defect until the expiration of such period; and (b) if Lessee so elects, at either the original or extended time for performance, to pay said purchase price without deduction for defects in title, Lessor shall convey such title as it has to the premises in their then condition.

The acceptance of a deed and possession by Lessee or Lessee's nominee shall be deemed to be of full performance and discharge of every agreement and obligation herein contained or expressed.

Time shall be of the essence under this paragraph.

25.(a) After completion and acceptance of the building, if the Lessor shall determine to accept a bona fide offer to purchase such property or to enter into a particular agreement to sell or convey the same, Lessor shall give written notice of the terms and conditions thereof to Lessee, and within ninety (90) days therefrom, Lessee may give written notice to Lessor that it or its nominee or assignee will purchase said property on the same terms and conditions and in such event, the Lessor

Exhibit 3, Annexed to Affidavit of Robert Layton

agrees that it will sell and convey such property to Lessee or its nominee or assignee, on the same terms and conditions and at the same price.

25.(b) Lessee's said notice that it will purchase such property shall specify a time and place for closing of title and a date for closing no more than forty-five (45) days from the date of such notice.

25.(c) The purchase price shall be payable in accordance with the terms of said offer or agreement which would have been accepted or entered into by the Lessor if the option had not been exercised.

25.(d). Lessor covenants that it will deliver to Lessee or its nominee or assignee at the closing a good and sufficient warranty deed, conveying a good and marketable title to the purchaser free from liens, encumbrances and defects, except as hereinafter set forth, and except such as the purchaser shall approve. Said deed shall be in form approved by Lessee's attorneys and the Lessor shall affix thereto at its expense, and cancelled, revenue stamps in the proper amount. State and local taxes shall be paid equally by the parties.

25.(e) Mortgage interest shall be apportioned as of the date of closing.

25.(f) At Lessee's option, Lessee may take title subject to any mortgage affecting the premises, in which event the purchase price shall be reduced by the principal amount of such mortgage, but otherwise all mortgages shall be discharged of record by the Lessor prior to closing.

25.(g) All assessments affecting the property which may be assessed, levied, confirmed or which become liens prior to the date of said notice by Lessee exercising this option shall be discharged prior to closing by Lessor.

Exhibit 3, Annexed to Affidavit of Robert Layton

25.(h) In the event of loss or damage to the property by fire or other casualty, or in the event of a taking of all or a substantial material part or parts of the property by eminent domain prior to closing, notwithstanding any provision of law to the contrary, the Lessee may, at its option, rescind its notice that it will purchase the property, and in such event, the Lessor shall return to it all sums paid on account of the purchase price, or the Lessee may elect to purchase the property and in such event the Lessor shall deliver to the Lessee all insurance proceeds or awards received by it for such taking or shall deliver to the Lessee a duly-executed instrument, assigning the Lessor's interest in said insurance proceeds or said awards, as the case may be. Such instrument shall be in form approved by Lessee's attorneys.

25.(i) This option agreement shall be binding upon and shall inure to the benefit of the parties hereto and their successors and assigns and shall continue in force as against all subsequent owners of the property until the expiration of the term of this Lease as it may be extended, or until the property has been wholly purchased by the Lessor or its nominee or assignee.

25.(j) The provisions of subparagraphs 25(d), (e), (f), (g) and (h) hereof shall be binding and in effect unless contrary to the terms of the offer or agreement which the Lessor would have accepted or made for the sale of the property but for the exercise of this option.

The Lessor covenants that it will not sell or convey such property without first giving Lessee first option to purchase the same as herein provided. This paragraph shall not apply in the event of sale in connection with foreclosure of any first mortgage covering the premises. The restrictions contained in this paragraph shall bind the Lessor's heirs, representatives, successors, assigns, transferees and grantees.

Exhibit 3, Annexed to Affidavit of Robert Layton

26. The parties of this Lease hereby agree that there shall be no prepayment of rent without the written consent of the primary mortgagee of Lessor. The parties hereto agree not to assign their responsibilities under the terms of this Lease without the written consent of the primary mortgagee, which consent shall not affect the rights given to Lessee under Paragraph 14 of this Lease.

27. The parties hereto agree not to alter or change any of the terms of this Lease without the written consent of the primary mortgagee of Lessor.

28. The Lessor covenants that this Lease shall be paramount and prior in effect to all mortgages, liens or deeds of trust, except a first mortgage which may at any time cover the premises. It is agreed that this Lease shall be subject and subordinate to such first mortgage, provided that the holder of any such mortgage shall agree by written instrument, which shall be duly and promptly recorded, and a copy of which shall be delivered to the Lessor and the Lessee, as follows:

(a) In the event that the Lessee is not in default pursuant to this Lease, this Lease or the Lessee's rights will not be cut off or impaired in the event of foreclosure or proceedings in lieu of foreclosure, provided that the Lessee shall attorn to the mortgagee or the purchaser on foreclosure in the event of foreclosure; and

(b) In the event that the building or improvements are damaged by fire or other casualty, or because of a taking by eminent domain, insurance proceeds or the award, as the case may be, which may be payable, shall first be applied to repair, restoration and rebuilding of the building and/or improvements as provided in this Lease, before such proceeds or the award shall be applied in satisfaction of the principal debt secured by the mortgage.

Exhibit 3, Annexed to Affidavit of Robert Layton

29. This Lease shall not be binding and in effect until a counterpart hereof has been executed and delivered by the parties each to the other. This Lease contains the entire agreement of the parties and may not be modified except by instrument in writing.

30. It is further agreed and understood that a memorandum copy of this Lease will be made and executed by the parties hereto, such memorandum copy to be recorded pursuant to the laws of the State of New Jersey.

31. It is further agreed and understood that upon the expiration of the term of this Lease and any renewals thereof, the Lessee will surrender and deliver unto the Lessor possession of said premises in as good order and condition as when received, save and except ordinary wear and tear, Lessor's negligence, and damage caused by fire or other casualty covered under the fire insurance policy with extended coverage required to be kept in force by Lessor under the terms of this Lease.

32. This Lease shall bind and inure to the benefit of the parties hereto and their respective heirs, representatives, successors and assigns (provided that this Lease shall not inure to the benefit of any assignee pursuant to an assignment which is not in compliance with the terms of this Lease).

IN WITNESS WHEREOF, this instrument has been duly executed by the parties hereto as of the day and year first above written.

BENDERSON DEVELOPMENT COMPANY, Inc.

Jack Chesbro, its Vice President

Nathan Benderson, its President

INTERNATIONAL BUSINESS MACHINES CORPORATION

By H. Wisner Miller, Jr.

126a

EXHIBIT 4, ANNEXED TO AFFIDAVIT OF ROBERT LAYTON--
LETTER, DATED APRIL 29, 1963.

IBM

Data Processing Division
Eastern Regional Office
425 Park Avenue, New York 22, N.Y.

PLaza 1-6060

International Business Machines Corporation

April 29, 1963

Mr. Jack Chesbro
Benderson Development Company, Inc.
135 Delaware Avenue
Buffalo 2, New York

RE: ELIZABETH, NEW JERSEY

Dear Mr. Chesbro:

The purpose of this letter is to confirm the understanding had between Benderson Development Company, Inc., and IBM in reference to IBM's desire to have its new Elizabeth Sales Office constructed in Cranford, New Jersey.

At our request you have contracted to purchase from the Town of Cranford a parcel of land containing approximately 6.6 acres adjacent to the Garden State Parkway, and more particularly bounded and described in accordance with the description contained in Exhibit A attached hereto and made a part hereof, as drawn in accordance with a survey made by Sailer & Sailer, Civil Engineers and Surveyors of 64 Broad Street, Elizabeth, New Jersey, dated January 7, 1963.

You warrant that said property as described in Exhibit A is the same parcel of land which has been subject to discussions between Benderson Development Company, Inc., and IBM, and that said property encompasses all of the land shown on a plan previously exhibited to and delivered to the Real Estate Department of IBM.

It is understood and agreed that you will exercise your right to purchase in our behalf in your name, said parcel of land from the Town of Cranford, and others as you may be directed, for the sum of \$168,450.00, including all real estate commissions. It is understood that there will be improvements to the property which will cost approximately \$30,000.00. However, you agree to make no commitment on this property that will be binding upon you or IBM unless said parcel of land has been zoned to meet IBM's requirements for construction of the building contemplated for its use and occupancy,

EXHIBIT 4, ANNEXED TO AFFIDAVIT OF ROBERT LAYTON

Mr. Jack Chesbro

-2-

April 29, 1963

RE: Elizabeth, New Jersey

and you further agree that said parcel of land will not be encumbered by any deed restrictions, mortgages, leases, easements or other existing facts which would prohibit or interfere with the building contemplated and the full use and enjoyment of the premises by IBM. Said building is to be a one story and basement building for IBM's Sales Office use.

From time to time you may be authorized by IBM to spend additional money for such items as surveys, soil borings, etc., in connection with this site.

In the event that, after you have purchased said parcel of land described in Exhibit A attached hereto, your company will not be the landlord for the new building to be constructed thereon for IBM's use and occupancy, IBM agrees to the following:

- 1 - Within thirty (30) days after the awarding of the building to an investor, IBM will reimburse you for the costs you have incurred in acquiring said parcel of land, including interest at the rate of 6% per year on such costs. However, it is understood that your personal costs expended in securing this parcel of land, such as travelling, hotel and meals, are not to be reimbursed to you by IBM.
- 2 - You agree that within thirty (30) days after IBM shall have awarded the building to an investor, you will sell, transfer and convey said parcel of land described above to IBM or its assignee at the same purchase price paid by your company to \$153,000.00, plus utilities and improvements to the property which will cost approximately \$30,000.00.
- 3 - IBM agrees to reimburse you for travelling expenses incurred by you if these expenses were necessitated by your appearance at certain zoning meetings and other meetings on IBM's behalf, provided said trips were authorized by IBM prior to your incurring said expenses.
- 4 - IBM shall have the right to reimburse you in cash for any expenses made pertaining to this location, provided same were authorized by IBM prior thereto, in lieu of your using your own funds.

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EXHIBIT 4, ANNEXED TO AFFIDAVIT OF ROBERT LAYTON

Mr. Jack Chesbro

-3-

April 29, 1963

RE: Elizabeth, New Jersey

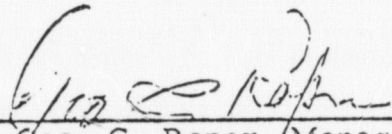
- 5 - IBM agrees that it will, as expeditiously as possible, pursue the commencement of this building. It is anticipated that construction may start early in the summer of 1963. IBM has engaged Mr. Victor Lundy to design a building for our use and occupancy on said parcel of land.

If you are in agreement with the foregoing, kindly sign the attached copy of this letter and return it to Mr. T. F. Daly, IBM Corporation, 425 Park Avenue, New York 22, New York

Very truly yours,

INTERNATIONAL BUSINESS
MACHINES CORPORATION

BY: _____


Geo. C. Roper, Manager
Real Estate Department

GCR:TFD:HVM

ACCEPTED AND AGREED:

BENDERSON DEVELOPMENT COMPANY, INC.

BY: _____


TITLE: _____

DATE: _____

129a

(This page intentionally left blank.)

**Exhibit 5, Annexed to Affidavit of Robert Layton—
Standard Form of Agreement Between Owner and
Architect.**

(See opposite and following pages.) 

131a

A STANDARD FORM OF AGREEMENT BETWEEN OWNER AND ARCHITECT

On a Percentage Basis Including Engineering Services



Copyright © 1958 by The American Institute of Architects, 1735 New York Ave., N.W., Washington 6, D. C.

THIS AGREEMENT made as of the SIXTEENTH
day of JULY in the year Nineteen Hundred and SIXTY TWO
by and between INTERNATIONAL BUSINESS MACHINES CORPORATION

hereinafter called the Owner, and
VICTOR A. LUNDY, ARCHITECT, A.I.A.,
6 EAST 65TH STREET, NEW YORK 21, N.Y.

hereinafter called the Architect,
WITNESSETH, that whereas the Owner intends to ERECT A NEW OFFICE BUILDING TO
BE KNOWN AS THE IBM GARDEN STATE OFFICE BUILDING ON THE SITE
AT THE GARDEN STATE PARKWAY, EXIT , NEW JERSEY,

hereinafter called the Project.

NOW, THEREFORE, the Owner and the Architect for the considerations hereinafter set forth agree as follows:

- A The Architect agrees to perform professional services for the above Project as hereinafter set forth.
- B The Owner agrees to pay the Architect as compensation for his services:

1) For his basic services (7 %) of the project construction cost, This sum hereinafter referred to as the Basic Rate, the work to be let under a single lump sum contract. ~~Base work~~ is \$67,928. This contract is based on a set fee arrived at by a percentage ~~of the project construction cost~~ of the project construction cost (7 %). This is the agreed upon set fee which will not be affected by actual final project construction cost, be it above or below budget.

(1958 Edition)

portion to services performed to increase the compensation for basic services to the following percentages at the completion of each phase of the work:

- 1 Schematic Design Phase 15%
 - 2 Design Development Phase 35%
 - 3 Construction Documents Phase 75%
 - 4 Receipt of Bids 80%
 - 5 Construction Phase 100%
- 2 Payments for extra services of the Architect as defined in Article II above, and for Reimbursable Expense as defined in Article V, paragraph 2, shall be made monthly upon presentation of Architect's detailed invoice.
- 3 No deduction shall be made from the Architect's compensation on account of penalty, liquidated damages, or other sums withheld from payments to contractors.
- 4 If any work designed or specified by the Architect during any phase of service is abandoned or suspended in whole or in part, the Architect is to be paid for the service performed on account of it prior to receipt of written notice from the Owner of such abandonment or suspension, together with reimbursements then due and any terminal expense resulting from abandonment or suspension for more than three months.

VII ACCOUNTING RECORDS OF THE ARCHITECT

Records of the Architect's Direct Personnel, Consultant, and Reimbursable Expense pertaining to this Project and records of accounts between the Owner and contractor shall be kept on a generally recognized accounting basis and shall be available to the Owner or his authorized representative at mutually convenient times.

VIII TERMINATION OF AGREEMENT

This Agreement may be terminated by either party upon

seven days' written notice should the other party fail substantially to perform in accordance with its terms through no fault of the other. In the event of termination, due to the fault of others than the Architect, the Architect shall be paid for services performed to termination date, including reimbursements then due, plus terminal expense.

IX OWNERSHIP OF DOCUMENTS

Drawings and specifications as instruments of service are the property of the Architect whether the Project for which they are made be executed or not. They are not to be used on other projects except by agreement in writing.

X ARBITRATION

Arbitration of any dispute arising out of this Agreement shall be at the option of either party in accordance with the provisions then prevailing of the Standard Form of Arbitration Procedure of The American Institute of Architects. This Agreement shall be specifically enforceable under the prevailing arbitration law and judgment upon the award rendered may be entered in the court of the forum, state or federal, having jurisdiction. The decision of the arbitrators shall be a condition precedent to the right of any legal action.

XI SUCCESSORS AND ASSIGNS

The Owner and the Architect each binds himself, his partners, successors, assigns and legal representatives to the other party to this Agreement and to the partners, successors, assigns and legal representatives of such other party in respect of all covenants of this Agreement. Neither the Owner nor the Architect shall assign, sublet or transfer his interest in this Agreement without the written consent of the other.

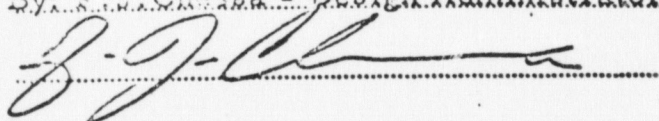
IN WITNESS WHEREOF the parties hereto have made and executed this Agreement, the day and year first above written.

Owner

International Business Machines Corp.....

425 Park Avenue - New York 22, N.Y.....

By: E. J. Chessa - Design Administrator

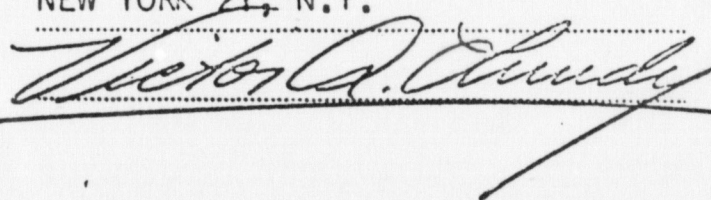


Architect

VICTOR A. LUNDY, ARCHITECT

6 EAST 65TH STREET

NEW YORK 21, N.Y.



C The parties hereto further agree to the following conditions:

1 BASIC SERVICES OF THE ARCHITECT

1 Schematic Design Phase

- a) The Architect shall consult with the Owner to ascertain the requirements of the Project and shall confirm such requirements to the Owner.
- b) He shall prepare schematic design studies leading to a recommended solution together with a general description of the Project for approval by the Owner.
- c) He shall submit to the Owner a statement of the probable project construction cost based on current area, volume or other unit costs.

2 Design Development Phase

- a) The Architect shall prepare from the approved schematic design studies, the design development documents consisting of plans, elevations and other drawings, and outline specifications, to fix and illustrate the size and character of the entire Project in its essentials as to kinds of materials, type of structure, mechanical, and electrical systems and such other work as may be required.
- b) He shall submit to the Owner a further statement of the probable project construction cost and, if authorized, obtain a semi-detailed estimate of such cost.

3 Construction Documents Phase

- a) The Architect shall prepare from the approved design development documents, working drawings and specifications setting forth in detail and prescribing the work to be done, and the materials, workmanship, finishes, and

equipment required for the architectural, structural, mechanical, electrical, service-connected equipment, and site work, and the necessary bidding information, General Conditions of the Contract, and Supplementary General Conditions of the Contract, and shall assist in the drafting of proposal and contract forms.

- b) He shall keep the Owner informed of any adjustments to previous statements of the probable project construction cost indicated by changes in scope, requirements or market conditions.

4 Construction Phase

- a) The Architect shall assist the Owner in obtaining proposals from contractors, and in awarding and preparing construction contracts.

b) He shall keep the Owner informed of the progress of construction; check and approve schedules and shop drawings for compliance with design; maintain construction accounts; prepare change orders; examine contractors' Applications for Payment; issue Certificates for Payment in amounts approved by him; provide general administration of the construction contracts, including periodic inspections at the site; determine date of substantial completion; make final inspection of the Project; assemble written guarantees required of the contractors; and issue the final Certificate for Payment.

- c) He shall endeavor to guard the Owner against defects and deficiencies in the work of contractors, but he does not guarantee contractors' performance under their contracts.

d) If recommended by the Architect and approved by

the Owner, a full-time Project Inspector will be selected, employed, and directed by the Architect.

II. EXCESS SERVICES OF THE ARCHITECT

The following services, if performed due to unusual circumstances, shall be the Architect's expense, and shall be paid for by the Owner as a Multiple of Direct Personnel Expense:

- 1 Making planning surveys and special analyses of the Owner's needs to clarify requirements of the Project when requested by the Owner.
- 2 Making measured drawings of existing construction when required for planning additions or alterations thereto.
- 3 Revising previously approved drawings or specifications to accomplish changes ordered by the Owner.
- 4 Preparing documents for alternate bids and change orders requested by the Owner.
- 5 Supervising the replacement of any work damaged by fire or other cause during construction.
- 6 Arranging for the work to proceed should the contractor default due to delinquency or insolvency.
- 7 Providing prolonged contract administration and inspection of construction should the construction contract time be exceeded by more than 25% due to no fault of the Architect.
- 8 Preparing as-built drawings showing construction changes in the work and final locations of mechanical service lines and outlets, if requested by the Owner.
- 9 Making an inspection of the Project prior to expiration of the guarantee period and reporting observed discrepancies under guarantees provided by construction contracts, if requested by the Owner.

III. THE OWNER'S RESPONSIBILITIES

- 1 The Owner shall provide full information as to his requirements for the Project.
- 2 He shall designate, when necessary, representatives authorized to act in his behalf. He shall examine documents submitted by the Architect and render decisions pertaining thereto promptly, to avoid unreasonable delay in the progress of the Architect's work. He shall observe the procedure of issuing orders to contractors only through the Architect.
- 3 He shall furnish or direct the Architect to obtain at the Owner's expense, a certified survey of the site, giving, as required, grades and lines of streets, alleys, pavements, and adjoining property; rights of way, restrictions, easements, encroachments, zoning, deed restrictions, boundaries, and contours of the building site; locations, dimensions, and complete data pertaining to existing buildings, other improvements and trees; full information as to available service and utility lines both public and private; and test borings and pits necessary for determining subsoil conditions.
- 4 He shall pay for structural, chemical, mechanical, soil mechanics or other tests and reports if required.
- 5 He shall arrange and pay for such legal and auditing services as may be required for the Project.

IV. PROJECT CONSTRUCTION COST

- 1 Project construction cost as herein referred to means the total cost of all work designed or specified by the Architect, but does not include any payments made to the Architect or consultants.

- 2 Project construction cost shall be based upon one of the following sources with precedence in the order listed:

- a) Lowest acceptable bona fide Contractor's proposal received for any or all portions of the Project.
- b) Estimate of project construction cost as defined in paragraph 4 below.
- c) The Architect's latest statement of probable project construction cost based on current area, volume or other unit costs.

- 3 When labor or material is furnished by the Owner, the project construction cost shall include such labor and material at current market cost.
- 4 If a fixed limit of project construction cost is stated herein, or if otherwise authorized by the Owner, estimates of the project construction cost prepared in semi-detailed or detailed form by an experienced estimator will be secured by the Architect during the Design Development or Construction Documents Phase.
- 5 If the estimated project construction cost or the lowest bona fide proposal is in excess of any limit stated herein, the Owner shall give written approval of an increase in the limit, or he shall cooperate in revising the project scope or quality, or both, to reduce the cost as required.
- 5 Since the Architect has no control over the cost of labor and materials, or competitive bidding, he does not guarantee the accuracy of any statements of probable construction cost.

V. THE ARCHITECT'S EXPENSE

- 1 Direct Personnel Expense includes that of principals and employees engaged on the Project including architects, engineers, designers, job captains, draftsmen, specification writers, typists and inspectors, in consultation, research, designing, producing drawings, specifications and other documents pertaining to the Project, and inspecting construction of the Project. Employees' time shall be at their regular rates of pay.
- 2 Reimbursable Expense includes actual expenditures made by the Architect in the interest of the Project for the following incidental expenses:
 - a) Expense of transportation and living of principals and employees when traveling in connection with the Project; long distance calls and telegrams; reproduction of drawings and specifications, excluding copies for Architect's office use and duplicate sets at each phase for the Owner's review and approval; and fees paid for securing approval of authorities having jurisdiction over the Project.
 - b) If authorized in advance by the Owner, the expense of Project Inspector, overtime work requiring higher than regular rates, semi-detailed and detailed estimates of project construction cost, perspectives or models for the Owner's use.
 - c) If their employment is authorized in advance by the Owner, fees of special consultants, for other than the normal structural, mechanical and electrical engineering services.


VI. PAYMENTS TO THE ARCHITECT

- 1 Payments on account of the Architect's basic services shall be as follows:
 - a) A primary payment of 5 per cent of the compensation for basic services, payable upon the execution of the Agreement, is the minimum payment under the Agreement.
 - b) Subsequent payments shall be made monthly in pre-

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(This page intentionally left blank.)

**Exhibit 6, Annexed to Affidavit of Robert Layton—
Page From Deposition of F. J. Chessa.**

(See opposite page.) 

1
2 space?

3 A Yes.

4 Q How long did you hold that position?

5 A I held that until about the early part of '62.

6 Q What position did you hold or come to hold in
7 1962?

8 A Design administrator.

9 Q Can you tell me what duties that encompassed?

10 A Coordinating the design and construction for
11 branch offices, IBM branch offices.

12 Q Who did you work for in 1962 as design
13 administrator?

14 A George Roper.

15 Q What division of IBM was that in?

16 A Data Processing Division.

17 Q Was George Roper your immediate superior?

18 A Yes.

19 Q Was that in the Real Estate Department of the
20 Data Processing Division?

21 A That's right.


22 Q Was that called the Eastern Region Real
23 Estate Department?

24 A That's right.

25 Q Was Mr. Daly in that department?

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**Exhibit 7, Annexed to Affidavit of Robert Layton—
Letter, Dated January 3, 1968.**

(See opposite page.) 

139a

CRAVATH, SWAINE & MOORE

ONE CHASE MANHATTAN PLAZA

NEW YORK, N.Y. 10005

HAURICE T. MOORE
BRUCE BROMLEY
ROSWELL L. GILPATRICK
CARLYLE E. MAW
EDWARD S. PINNEY
THOMAS A. HALLERAN
ALBERT R. CONNELLY
L. R. BRESLIN, JR.
GEORGE B. TURNER
FRANK H. DETWEILER
GEORGE G. TYLER
JOHN H. MORSE
HAROLD R. MEDINA, JR.
CHARLES R. LINTON
WILLIAM B. MARSHALL
RALPH L. MCAFEE
ROYALL VICTOR
ALLEN H. MERRILL
HENRY W. DE KOSHIAN
ALLEN F. MAULSBY
STEWART A. GROSS, JR.
HENRY R. RIORDAN
JOHN R. HUPPER
SAMUEL C. BUTLER
WILLIAM J. SCHRECK, JR.
BENJAMIN F. CRANE
FRANCIS F. RANDOLPH, JR.
JOHN F. HUNT, JR.
GEORGE J. GILLESPIE, III
RICHARD B. SIMMONS
JOHN W. BARNUM
WAYNE E. CHAPMAN
THOMAS D. BARR
MELVIN L. GEDRICK
GEORGE T. LOWY
ROBERT ROSENTHAL
JAMES H. DUFFY
ALAN J. KRUSKA
JOHN E. YOUNG

CARL W. PAINTER
COUNSEL

212 MANOVER 2-3000
TELEX: 1-25547
TELETYPE: 710 681-0338

EUROPEAN OFFICE
4, PLACE DE LA CONCORDE
PARIS 8^e
TELEPHONE: 266-81-17
TELEX: 29 530

CABLE ADDRESSES
CRAVATH, N.Y.
CRAVATH, PARIS

January 3, 1968

Koufman v. IBM

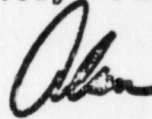
Dear Bob:

This is in response to your request for information concerning Mr. H. W. Miller, Jr.

From May 16, 1961, until October 29, 1963, Mr. Miller was a Group Executive and Vice-President of IBM, responsible for the Electric Typewriter and Supplies Divisions. During that period, Mr. Miller had no direct responsibility for the real estate and construction activities of IBM and thus did not take part in, have any responsibility for, or have any knowledge of, any negotiations or communications between IBM and Mr. Koufman regarding the Cranford project.

On October 29, 1963, Mr. Miller assumed his present position, President of the Real Estate and Construction Division of IBM.


Very truly yours,



Robert Layton, Esq.,
Messrs. Gilbert, Segal and Young,
405 Park Avenue,
New York, N. Y. 10022

MM


**Exhibit 8, Annexed to Affidavit of Robert Layton--
Document Prepared by M. Daly to Compare the De-
velopers Proposals.**

(See opposite page.) 

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	I	II	III		IV		V	
SCARLETT	97.330	—	—	—	—	—	Y	7.85 7.8
MISS No	—	—	—	—	—	—	—	—
LAND	98,000	107,000	98 36	62	102 36	66,000	Y	7.90 7.4
KNOCKE	95,825	—	—	—	—	—	Y/N	7.3 5.5
MAN	107,700	—	—	—	—	—	X	8.7 8.0
PP.	104,760	—	—	—	—	—	Y/N	7.9 7.7
ANDERSON	94,933	—	96,275 22	74,275	—	—	Y	8 8
Limman	93 — 95 —	—	—	—	—	—	Y	7.9 7.9
ow - No	—	—	—	—	—	—	—	—
orkson	?	?	116,000 13,269	90,000	—	—	Y	8 8
Wentworth	104,370	—	—	—	—	—	X	8.9 8.9
ingling	—	—	—	—	—	—	—	—
owe	107,000	107,250	102 13	89,000	107,250 14	93,250	Y	8 7.2
OLDFELD	117,000	116,500	114,000 30,000	84,000	118,500 30,000	86,500	None	8 7
OUFMAN	96,600	99,600	96,600 36,000	60,600	99,500 36,000	63,500	Y/20	7.7 7

**Exhibit 9, Annexed to Affidavit of Robert Leyton—
Pages 105 Through 108 of Deposition of Thomas F.
Daly.**

(See opposite and following pages.) 

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Q Pardon?

A I say I don't know.

Q Can you find out?

A I could find out.

Q If you have it, I would request that you turn it over to Mr. Hemphill. Will you do that if you do have it?

MR. HEMPHILL: I'll respond to the request: that we will undertake to take the request under consideration and we will advise you.

Q Let me show you Plaintiff's Exhibit 27 for identification, Mr. Daly, and ask whether you prepared this or whether you know who prepared it.

A It looks like I prepared it.

Q Is that a list of all the people who submitted bids for development of the Cranford project?

A I presume this is a list of the investors that returned the proposals to us, yes.

Q Is it broken down by the various items on the conditions of proposal?

A It is broken down into the six items in the proposal, yes.

Q Is there an indication in each column as to that investor's response on each of those items, if there was

any?

A I would say yes.

Q Looking at the last line, which reads "Koufman," is there a checkmark next to item I?

A I would say there is a checkmark next to Mr. Koufman's name.

Q Did you put that checkmark there?

A I don't know.

Q Do you know to what that checkmark refers?

A I would assume that this seemed to be the best over-all proposal submitted.

Q Would you read the indication, on the line for Mr. Koufman, with respect to item V.

A "Yes."

Q The word "Yes"; is that correct?

A Mm-hm.

Q Does that refer to the response as to whether that bidder indicated it would be necessary for IBM to assume the outstanding mortgages with respect to the right of IBM to purchase the property?

A No. I would say it indicated that he was willing to sell the building.

Q That he was willing to sell the building?

A Mm-hm; that IBM had the right to purchase it.

2 Q Doesn't item V indicate that it wanted a re-
3 sponse as to the terms under which the investor would
4 sell the building to IBM?

5 A Mm-hm.

6 Q What is there about item V that had to be
7 completed in addition to the figures, other than the in-
8 dication as to whether, in response to those figures, it
9 would be necessary for IBM to assume the outstanding
10 mortgages?

11 A The only thing to be completed would be the
12 will or will not assume the outstanding mortgages.

13 Q That's right.

14 Now take a look at the column under V on Plain-
15 tiff's 27 for identification.

16 A Item V?

17 Q Item V.

18 Isn't there an indication in that column as to
19 the response of each of those bidders on item V?

20 A That particular item?

21 Q Yes.

22 A I don't know. I'd have to review all of the
23 proposals to further define what the Y's and the N's mean.

24 Q You don't know now?

25 A No.

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Q Was Plaintiff's 27 prepared by you at the time of its preparation on the basis of analyzing all of the proposals?

A Yes.

Q And you did fill in those columns at that time.

A I assume, yes.

Q And you were able to fill in item V with respect to Mr. Koufman's bid.

A Yes.

Q Did you ever tell Mr. Koufman that your interest in his proposal was particularly with respect to his item III?

A As I recall, yes.

Q When?

A I don't recall exactly when.

Q In the year 1963?

A Yes.

Q Was it after the opening of the construction bids?

A I don't recall.

Q Was it in the summer?

A I don't recall.

Q But you do recall telling him.

A I recall discussing it with him, yes.

Q You recall discussing it with him.

Statement of Plaintiff Pursuant to Rule 9(g).

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Pursuant to Rule 9(g) of the General Rules of this Court, plaintiff controverts all issues contained in the statement of defendant International Business Machines Corporation ("IBM") except as admitted below and asserts that there exist genuine issues of fact between him and IBM as appear below:

1. Plaintiff agrees that IBM is a New York corporation with its principal place of business in New York. Plaintiff is a resident of Massachusetts.

2. The documents annexed to IBM counsel's affidavit constitute a contract between the parties, breached by IBM to plaintiff's great damage. The construction of these documents involves mixed issues of law and fact.

3. To the extent that the issue is now raised by IBM, there may be a genuine factual issue to be tried as to the authority of Messrs. Daly and Roper to bind IBM in the circumstances of this case.

4. There is a genuine issue to be tried as to whether IBM in its request for bids had not eliminated the subject of taxes and insurance from any development contract for its project.

5. There is a genuine issue to be tried as to whether IBM, through its agents and employees, did represent by its net lease proposal that the payment of taxes and insurance for the project after occupancy would be made by IBM.

6. There is genuine issue to be tried as to whether IBM breached its agreement.

Statement of Plaintiff Pursuant to Rule 9(g)

7. There is genuine issue to be tried as to the damages suffered by plaintiff.

8. To the extent that IBM now raises the issue, there is a genuine issue of fact as to the agreement between the parties as to which of the parties bears the economic burden of taxes and insurance after occupancy by IBM.

9. There is genuine issue of fact as to whether IBM's actions in breach of the contract prevented plaintiff from proceeding with his performance of the contract.

10. There is genuine issue as to the amounts of any costs to plaintiff in connection with real estate taxes on the property in question and of insurance premiums on said property, and IBM has offered no proof at all on these subjects.

Dated: New York, New York
May 2, 1968.

Respectfully submitted,

GILBERT, SEGALL AND YOUNG

Attorneys for Plaintiff

Office & P. O. Address

405 Park Avenue

New York, New York 10022

PLaza 2-9650

Affidavit of Thomas F. Daly in Support of Motion.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York,
County of Westchester, ss:

THOMAS F. DALY, being duly sworn, deposes and says:

I am Manager of Real Estate Administration for the Eastern Area of the Real Estate and Construction Division of International Business Machines Corporation (IBM). I make this affidavit in support of IBM's motion for summary judgment dismissing plaintiff's first claim.

Prior to my present position, which I assumed in December, 1963, I was an administrator in the Real Estate Department of the Eastern Region of IBM's Data Processing Division. In that capacity, I negotiated with plaintiff concerning the construction and leasing to IBM of a building to be located in Cranford, New Jersey. Additionally, I had supervisory responsibility for another project in which plaintiff built and leased to IBM a branch office building in Utica, New York, negotiations for which were conducted contemporaneously with those of the Cranford project.

I have read the affidavits of plaintiff and his counsel, Mr. Robert Layton, both sworn to May 2, 1968. Counsel's affidavit (p. 5) contends that "the payment of taxes and insurance is always by the prime tenant [i. e., IBM], the developer simply handling the bookkeeping and billing therefor". That conclusion is said to be based on plaintiff's affidavit (p. 3) which asserts that IBM's standard form lease, which the General Conditions specified

Affidavit of Thomas F. Daly in Support of Motion

was to be used "as applicable", was "known to be a 'net' lease", under which IBM would be responsible for taxes and insurance.

Each of those statements is inaccurate, as is demonstrated by the lease agreement entered into between plaintiff and IBM with respect to the Utica project referred to above. Thus, on June 13, 1963, seven days after plaintiff submitted his proposals on the Cranford project, he signed a "summary of understanding" (annexed hereto as Exhibit I) which provided as to the Utica project (1) that taxes were to be plaintiff's "responsibility, subject to escalation clause after first full year of occupancy", (2) that insurance was to be "IBM's responsibility" and (3) that "the lease will contain, in general, the terms and conditions of IBM's standard form of lease". In short, that memorandum contemplated both the use of IBM's standard form lease and the assumption by plaintiff of the responsibility to pay each year all taxes on the property up to the amount paid during the first year after full construction of the building.

Annexed hereto as Exhibit II is the standard form lease executed by IBM and plaintiff's corporation, Brookline Development Corp., on September 25, 1963, with respect to the Utica project, which provides that Brookline will "pay all real estate taxes" except those for any subsequent year which are "in excess of the real estate taxes paid or payable during the first full tax year occurring after the first full assessment of the building" (paragraph B of the "Supplement to Lease"). IBM, therefore, is responsible only for any increases in taxes over the first year's assessment.

Other examples of IBM's standard form lease reflecting further variations in the responsibility-for-taxes provisions are those between IBM and The Brooklyn Savings Bank, J. Robert and Arthur W. Baldwin and Christian

Affidavit of Thomas F. Daly in Support of Motion

Olesen, Jr., annexed hereto, respectively, as Exhibits III, IV and V. As is evident from an examination of paragraphs 6 through 19 of The Brooklyn Savings Bank lease and Rider A thereto, paragraphs 10 through 23 of the Baldwin lease and paragraphs 9 through 24 of the Olesen lease, the standard form is actually a collection of terms which are altered to fit particular situations. Thus, in the Brooklyn lease, the landlord assumes sole responsibility for taxes (paragraph 18); in the Baldwin lease, the landlord also assumes that responsibility (paragraph 22), except that IBM agrees to reimburse the landlord for such portion of the taxes in excess of the first year's payment as may be applicable to (a) that area of the second floor which IBM may opt to lease in the fifth through ninth years of the term, or (b) whatever portion of the building is occupied by IBM during any renewal term (paragraphs 24, 30 and 31); and in the Olesen lease, the landlord again assumes the principal responsibility, IBM agrees to pay for any increase above the first year's taxes and the landlord agrees to refund to IBM amounts equal to any subsequent decrease in taxes.

The obvious differences among those provisions reflect the different agreements reached between IBM and the developers during negotiations. Those differences are certainly not "nominal, involving the work of a bookkeeper or ministerial billing expense" (Koufman Aff., p. 3). They represent a very real shifting of the economic risk of any future tax increase or decrease, over and above the amount of the tax burden originally assumed by the developer in the form of lower profits on the project.

In much the same manner, the standard form provision for insurance (paragraphs 10 of the Brooklyn lease, 15 of the Baldwin lease and 13 of the Olesen lease) makes the landlord solely responsible for insurance costs. In the Utica lease, however, where a different agreement was

Affidavit of Thomas F. Daly in Support of Motion

negotiated, paragraph 10 provides that the landlord will be reimbursed for costs of insurance.

With respect to the Cranford, New Jersey, project, which is the subject of this action, the invitations to submit proposals which I sent to potential developers on May 23, 1963 (Hruska Aff., Ex. A), contained General Conditions which were incorporated in each developer's proposals and which provided that the "responsibility" for taxes and insurance "will be negotiated by the parties at a later date". It was certainly my intention, during the course of such negotiations, to obtain a provision under which the landlord would bear sole responsibility for some portion of the taxes on this property. Particularly was that so in connection with this project, since the Real Estate Department was primarily interested in Items III and IV under which the developer would sublease approximately 30% of the usable square footage of the building during the first five years of the proposed 17-year term. Since plaintiff's proposals were low on those two Items (although not on Items I and II), plaintiff was selected as the developer with whom we would attempt to negotiate final terms. At no point, however, was agreement ever reached with plaintiff as to who would be responsible for the payment of taxes and insurance. Indeed, we had not even reached the stage of negotiations at which any meaningful discussions of that term could have been conducted.

(Sworn to by Thomas F. Daly, May 13, 1968.)

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**Exhibit I, Annexed to Affidavit of Thomas F. Daly—
Letter, Dated June 13, 1963.**

IBM

International Business Machines Corporation

Data Processing Division

Eastern Regional Office

425 Park Avenue, New York 22, N. Y.

PLaza 1-6060

June 13, 1963

Mr. Manuel M. Koufman
1330 Beacon Street
Brookline 46, Massachusetts

Subject: New IBM Building
Utica, New York

Dear Mr. Koufman:

This letter will serve as a brief summary of our understanding concerning a new building to be constructed by you and leased to IBM, said building to be a "turn-key" job in all respects, including landscaping, paving of parking area, utility connections, etc.

Site Property at 1427 Genesee Street, Utica, New York, fronting 100 feet on Genesee Street and approximately 400 feet in depth, as more fully described in the attached Deed Description, which property you now own or control.

Zoning Responsibility for obtaining proper zoning of site for IBM's use to be yours.

Building One story of approximately 8900 square feet plus basement of 1200 square feet minimum.

Exhibit I, Annexed to Affidavit of Thomas F. Daly

Plans and Specifications To be prepared by your architect in accordance with IBM's Building Specifications previously delivered to you and subject to approval by IBM.

Term of Lease 12 years from January 1, 1964 to December 31, 1975.

Completion Not later than January 1, 1964. If building is ready earlier, IBM may occupy rent free until January 1, 1964.

Rent \$29,250 per year.

Services & Utilities To be IBM's responsibility.

Maintenance & Repairs You are responsible for the structure, exterior and roof of the building. Other items to be responsibility of IBM who will have benefit of all manufacturer's warranties, etc.

Taxes To be your responsibilities, subject to escalator clause after first full year of occupancy.

Insurance To be IBM's responsibility.

Options

A. Additional Construction

1. At any time during the lease, IBM may request construction of a 4000 square foot addition to the rear of the building. Annual rental for the addition to be \$2.25 per square foot. Lease to be extended, if required, so that eight years remain.

2. At any time during the lease, IBM may request construction of a second floor. Annual rental for second floor to be \$1.75 per square foot. Lease to be extended, if required, so that ten years remain.

Exhibit I, Annexed to Affidavit of Thomas F. Daly

B. Renewals

At the expiration of the original term or any extensions resulting from exercising Options A-1 and 2 above, IBM to have two additional five-year renewals on the same terms and conditions then existing.

C. Purchase

At the end of the initial term of the lease, IBM to have option to purchase the property for \$230,000. If options for additional space are exercised, a revised purchase option is to be negotiated at the time of exercising them.

Other Terms In addition to the foregoing specific terms, it is agreed that the lease will contain, in general, the terms and conditions of IBM's Standard Form of Lease, a copy of which is attached.

If this letter accurately summarizes our understanding, please sign one copy and return it to Mr. B. Perlman, IBM Corporation, 425 Park Avenue, New York 22, New York.

Very truly yours,

GEORGE C. ROPER, Manager
Real Estate Department

ACCEPTED AND AGREED:

By: s/ MANUEL M. KOUFMAN

Date (Illegible)

Attachments:

1. Deed Description of Site
2. IBM's Standard Form of Lease

**Exhibit II, Annexed to Affidavit of Thomas F. Daly—
Lease, Dated September 25, 1963.**

THIS LEASE, made as of the 25th day of September, 1963, between BROOKLINE DEVELOPMENT CORPORATION, a New York corporation, having its principal office at 235 Madison Avenue, City, County and State of New York, hereinafter called the "Landlord", and INTERNATIONAL BUSINESS MACHINES CORPORATION, a New York corporation, having its principal office at 590 Madison Avenue, City, County and State of New York, hereinafter called the "Tenant".

WITNESSETH:

That the Landlord hereby leases to the Tenant, and the Tenant hereby hires and takes from the Landlord the entire building and basement of the premises known as and by the street number 1427 Genesee Street, Utica, New York, and more particularly described in Schedule "A" attached hereto and made a part hereof, to be used and occupied by the Tenant for administrative offices, with the right of Tenant to store and display its merchandise so long as it is not visible from the street or evident from the exterior of the premises, and in which such merchandise may be maintained by adding component parts to, or repairing component parts of, such merchandise. The term shall begin on the 1st day of April, 1964 and shall end on the 31st day of March, 1976, subject to extension as hereinafter provided, at the annual rent of Twenty-Nine Thousand, Two Hundred Fifty Dollars (\$29,250.00), payable in monthly installments in advance of Two Thousand, Four Hundred Thirty-Seven and 50/100 Dollars (\$2,437.50), one each on the first day of every calendar month during the term hereof. Rent for any period of less than one month shall equal 1/30th of the monthly rent for each day of such period.

Exhibit II, Annexed to Affidavit of Thomas F. Daly

This Lease is granted and accepted upon the following terms, covenants and conditions, and the landlord and the Tenant hereby agree to keep and perform all the terms, covenants and conditions hereof on its part to be kept and performed:

1. The landlord covenants as a condition of the lease that it has good marketabilities to the premises, subject to encumbrances of record, if any, provided the same do not prevent the use of the premises for Tenant's purposes, that it has the right to make this lease for the term aforesaid, that it will put the premises and all building equipment (including, without limitation, all plumbing, electrical, heating and air conditioning equipment) in good repair and condition at the commencement of the term, that it will deliver possession of the premises to the Tenant at the commencement of the terms, and that the premises then will be fit and may lawfully be used by the Tenant for the uses hereinabove expressed.

2. The Tenant will pay said rent without deduction or demand to Landlord at 1380 Beacon Street, Brookline, Massachusetts, or to such other person or at such other place as the Landlord may designate in writing.

3. The Landlord covenants as a condition of the Lease at the commencement hereof, the premises will be furnished with an adequate water supply and all adequate air-conditioning, heating, lighting, and plumbing fixtures and equipment required under the plans and specifications hereinafter referred to. The Landlord will furnish all electric light fixtures and power service lines, including proper wiring in the leased premises, required under said plans and specifications. The building plans and specifications, elevations and detailed plans and specifications, and other items required for the construction of the building herein leased, have been prepared by the Landlord's architect. All the plans, specifications, etc.,

Exhibit II, Annexed to Affidavit of Thomas F. Daly

were approved by Tenant prior to the start of construction. However, approval by Tenant shall mean non-technical approval of materials and equipment and other general arrangements. Such approval shall not be considered to mean approval of, for example, structural capacities, size of ducts and piping, adequacy of electrical wiring, compressor capacities, etc.

It shall remain the Landlord's responsibility to insure that the structure and detail of mechanical systems meet the design and operational requirements of the IBM Branch Office Building Requirements and Specifications and of the plans and specifications approved by IBM.

4. The Tenant shall keep the premises in as good order, condition and repair as when delivered to it or as they may thereafter have been put, excepting ordinary wear and tear and damages caused by the Landlord's negligence and will make all repairs or replacements required in order to comply herewith, however, the Landlord shall keep in repair all portions of the roof and exterior of the building. The Landlord will make all structural repairs to the building. The Tenant shall replace all glass in the premises broken or damaged during the term as it may be extended, with glass of equal character, unless the same shall be broken by the Landlord's negligence. At the expiration of the term, The Tenant will remove its goods and effects (except as elsewhere provided herein) and will peaceably yield up to the Landlord the leased premises in as good order and condition as when delivered to it or as they may thereafter have been put, excepting ordinary wear and tear, repairs hereby required to be made by the Landlord and damage caused by the Landlord's negligence. In the event that the Landlord fails to make any repairs or replacements which it is required to make hereunder within thirty (30) days after written notice thereof by the Tenant, then in that event the Tenant may make

Exhibit II, Annexed to Affidavit of Thomas F. Daly

such repairs and deduct the cost thereof from the rent due or to accrue hereunder.

5. Tenant agrees to furnish services and utilities to the leased premises at its own cost and expense.

6. The Tenant agrees to comply with all the rules and regulations of the Board of Fire Underwriters, Officers or Boards of the City, County or State having jurisdiction over the leased premises, and with all applicable laws, ordinances, regulations and legal requirements as any of the foregoing pertain to the manner in which the Tenant shall occupy or use the leased premises and to the conduct of the Tenant's business. The Landlord agrees to comply with all such rules, regulations, and applicable laws, ordinances, and legal requirements which affect its obligations hereunder with respect to the demised premises.

7. The Tenant may place such temporary partitions, lighting fixtures, personal property, machinery, motors, and the like, in the leased premises and may make such nonstructural improvements and alterations in the interior thereof as it may desire at its own expense. All such things shall remain the property of the Tenant, and in case of damage or destruction thereto by fire or other causes, the Tenant shall have the right to recover as its own loss from any insurance company with which it has insured the same, notwithstanding the fact that any of such things might or could be considered to be a part of the leased premises. The Tenant shall remove all or any of such things prior to or at the expiration of this Lease. It is agreed that only an express abandonment in writing shall affect the Tenant's ownership of any such things, except that Tenant may abandon the same, in whole or in part, to the Landlord at the end or other expiration of the term by vacating the premises without removing the same. In the event

Exhibit II, Annexed to Affidavit of Thomas F. Daly

of the removal of such things or any of them, the Tenant shall not be required to remove pipes, wires and the like from the walls, ceiling or floors, provided that the Tenant properly cuts, caps and disconnects such pipes and wires and seals them off, if necessary, in a safe and lawful manner. All of the foregoing shall be done in good, workmanlike manner, and in compliance with all applicable building, zoning and other laws and regulations, and in connection therewith, Tenant will not permit any mechanic's, materialmen's or like lien to stand against the demised premises.

8. The Landlord shall have the right at all reasonable times during the term of this Lease to enter the leased premises for the purpose of examining or inspecting the same and of making such repairs or replacements therein as may be required by this Lease or as the Landlord shall deem necessary, provided, however, that the Landlord shall use all reasonable effort to disturb the Tenant's use and occupancy as little as possible.

9. The Tenant may assign this lease or sublet all or any part of the premises at any time covered hereby without consent of the landlord. However, the Tenant will advise the Landlord of any such changes, and agrees that any such assignee or subtenant will be of reasonable character and stature in the business community. In any event, the Tenant shall remain responsible for the faithful performance of all of the covenants, terms and conditions hereof on the Tenant's part to be performed.

10. In the event that the premises or the building shall be damaged by fire, the elements, casualty, war, insurrection, riot, public disorder or any cause or happening, the Landlord shall at its own expense repair such damage and restore the premises and/or the building to their original condition with all due diligence, provided,

Exhibit II, Annexed to Affidavit of Thomas F. Daly

however, that if the Landlord shall fail to proceed with and complete such repairs with all due diligence and in any event within 120 days, the Tenant may at its option terminate this Lease on sixty (60) days' notice of its intention so to do, or it may, after affording the Landlord's insurance adjusters opportunity to inspect the damage done, make such repairs for the account and at the expense of the Landlord, and the Landlord, upon receipt of a statement thereof from the Tenant, will reimburse the Tenant for all expenditures reasonably made by it in making such repairs, and in default of such reimbursement, the Tenant may deduct the amount of such expenditures from the rent due or to come due hereunder. The Tenant shall be entitled to an abatement of rent during the period in which the premises are rendered untenable or incapable of use for the purpose for which the same are at the time of such damage being used. If a part only of the premises is rendered untenable or incapable of such use, the rent shall be reduced in the proportion which the floor area of said part of the premises bears to the floor area of the entire premises. If the damage shall be so extensive as to constitute a total destruction of the building and the Landlord refuses or is unable to construct or rebuild the premises to the same condition as they were prior to the casualty within 120 days from the date of such casualty, this Lease and the term hereby created shall thereupon cease and expire. In the event that this lease terminates or is terminated, rent shall be apportioned and paid in full to the date of such termination, and all prepaid rent shall forthwith be repaid by the Landlord to the Tenant.

The Landlord shall maintain insurance, covering the building and premises in an amount equal to at least 80 percent of replacement cost thereof, exclusive of excavations and foundations, against loss or damage by fire and the perils specified in the standard extended coverage endorsement, and in case of damage or destruction

Exhibit II, Annexed to Affidavit of Thomas F. Daly

to the premises or building by fire or any of said perils, whether or not attributable to the negligence of the Tenant or its agents, visitors, servants or employees, this Paragraph 10 shall control and the Tenant shall have no liability to the Landlord or its insurer or insurers. However, Tenant agrees to reimburse the Landlord for the cost of obtaining such insurance during the term of this lease or any extended term hereof. If there be a mortgage on the premises, then the mortgagee shall be named in the policy with the Landlord, as its interest may appear.

11. If the Tenant shall default in the performance of any of its obligations pursuant to this lease and if such default shall continue for thirty (30) days after written notice thereof by the Landlord to the Tenant (except that if the Tenant cannot cure any such default within said thirty-day period, said period shall be extended for a reasonable additional period, provided that the Tenant commences to cure such default within said thirty-day period and proceeds diligently thereafter to effect such cure), or if the Tenant shall be adjudicated bankrupt or insolvent according to law, or shall make an assignment for the benefit of creditors, then and in any of said cases, the Landlord may lawfully enter into and upon said premises or any part thereof in the name of the whole, and repossess the same as of the former estate of the Landlord and expel the Tenant and those claiming under the Tenant and remove its effects, forcibly if necessary, without being deemed guilty of any manner of trespass and without prejudice to any remedies which might otherwise be used for arrears of rent of preceding breach of covenant, and upon entry as aforesaid, this Lease shall terminate.

12. If the Tenant remains in the premises beyond the expiration date of this Lease, as it may have been extended or renewed, such holding over in itself shall not

Exhibit II, Annexed to Affidavit of Thomas F. Daly

constitute a renewal or extension of this Lease, but in such event a tenancy from month to month shall arise subject to payment of the same rent by the Tenant each month as that payable on account of the last month of the demised term.

13. The Tenant, on paying the said rent and performing the covenants of this Lease on its part to be performed, shall and may peaceably and quietly have, hold and enjoy the demised premises for the term aforesaid and any extension or renewal thereof.

14. The Tenant may, at its option, extend the term of this Lease for a further term of five (5) years upon the same terms and conditions, by giving written notice to the Landlord, in the manner herein provided, of its intention to extend at least six (6) months prior to the end of the term, and thereupon the term of this Lease shall be so extended without any further action by either party.

If the term of this Lease is extended as aforesaid, the Tenant may, at its option, extend the term of this Lease for a second further term of five (5) years upon the same terms and conditions, by giving written notice to the Landlord, in the manner herein provided, of its intention to extend at least six (6) months prior to the end of the first extended term, and thereupon the term of this Lease shall be so extended without any further action by either party. Said options to extend the term of this Lease shall be effective as to all premises covered by this Lease at the time or times of the exercise thereof, and as to any other premises in the building or on adjoining premises which may at such time or times be under lease to the Tenant.

15. In the event that more than one-third ($1/3$) of either the ground floor area of the building to be built on the demised premises or the area required under said plans and specifications for parking area are taken

Exhibit II, Annexed to Affidavit of Thomas F. Daly

in condemnation proceedings or by any right of eminent domain or for any public or quasi public use or purpose, this Lease shall (at the election of either Landlord or Tenant exercised by written notice within thirty (30) days of such taking) terminate and expire on the date that possession is taken by the condemnor, and the rent herein reserved shall be apportioned and paid in full to that date and all prepaid rent shall forthwith be repaid by the Landlord to the Tenant and neither party hereto shall be liable to the other for rent, damage or otherwise for or by reason of any matter or thing occurring thereafter. If less than one-third ($1/3$) of either the ground floor area of the building to be built on the demised premises or the area required under said plans and specifications for parking area shall be so taken or condemned, and, in the opinion of both Landlord and Tenant, the remaining portion of the premises shall be adequate and suitable for use by Tenant for business purposes, then this Lease shall continue in full force and effect except that the fixed annual rent herein reserved shall be diminished in the proportion that the floor area of the part taken or condemned shall bear to the total floor area of the premises immediately prior to such taking. In such case the Landlord shall at its own expense, as speedily as circumstances permit, repair or "face off" such damage to the remaining portion of the demised premises and the building as shall have been caused by such partial condemnation and taking provided, however, that if the Landlord shall fail promptly to proceed with and complete such repairs, the Tenant may make such repairs, or so much thereof as shall be reasonably required thoroughly to protect the demised premises, to restore the same as nearly as may be to their former condition and to fit them for business purposes, for the account and at the expense of the Landlord, and the Landlord will, upon receipt of a state-

Exhibit II, Annexed to Affidavit of Thomas F. Daly

ment of the cost of such repairs from the Tenant, reimburse the Tenant for all expenditures reasonably made by it in making the same and in default of such reimbursement the Tenant may deduct the amount of such expenditures from the rent due or to come due hereunder. During the period of restoration and repairs, the rent shall be equitably abated to the extent that the premises may be untenable or incapable of use by the Tenant. If both Landlord and Tenant are unable to agree whether the remaining part of the premises can be used for Tenant's business purposes, then the matter shall be submitted to arbitration in accordance with the rules of the American Arbitration Association.

16. In every case, when under the provisions of this Lease it shall be necessary or desirable for the Tenant to serve any notice or demand on the Landlord, such notice or demand shall be served personally or by registered mail addressed to the Landlord, care of Manuel M. Koufman, 1330 Beacon Street, Brookline, Massachusetts, until otherwise directed in writing by the Landlord, and any such notice or demand to be given to the Tenant, shall be served by registered mail addressed to the Tenant's Administration Manager at the leased premises and copies of such notice shall be served simultaneously by registered mail on the Tenant, attention of The Field Real Estate Department, 200 Mamaroneck Avenue, White Plains, New York, and attention of The Real Estate Administrator, 425 Park Avenue, New York 22, New York, until otherwise directed in writing by the Tenant.

17. The Tenant shall have the privilege of placing on the premises or attaching to the exterior of the building its standard IBM sign. No other signs may be maintained in or on the premises or building without the prior written consent of the Tenant.

Exhibit II, Annexed to Affidavit of Thomas F. Daly

18. It is hereby agreed that, upon ten (10) days' written notice to the Landlord, the Tenant may pay delinquent taxes, assessments or other charges affecting the premises, and make payments pursuant to, or cure any defaults in, the terms of any mortgage, security deed or deed of trust affecting the demised premises, which is prior in lien or effect or paramount to this Lease, and upon such written notice the Tenant may pay and discharge, in installments or otherwise, any other charges, liens or encumbrances which may jeopardize the Tenant's right of possession or interest pursuant to this Lease, and in such event the Tenant may set off any such payment against the rent due or to become due under this Lease and/or the Tenant, upon written notice to the Landlord, may demand reimbursement therefor, or part thereof, from the Landlord, and the Landlord covenants to promptly reimburse the Tenant after such notice and demand. The foregoing rights in Tenant shall not be operative if any such payment is not made pursuant to a *bona fide* protest thereof and Landlord provides reasonable security therefor.

19. The Landlord covenants that the Tenant shall not be liable for any loss, injury (including death) or damages to any person or property on or about the premises from any cause prior to occupancy of the premises by the Tenant.

20. The Landlord warrants and represents that the premises may be used for the purposes for which they are hereby leased and in the event of the existence of any law, ordinance, rule, ruling or regulation prohibiting the use of said premises for any one or more of the purposes for which they are hereby leased, then in that event, at the option of Tenant, this Lease shall terminate and all liability thereunder shall cease and after

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the date such prohibition becomes effective, and any un-earned rent paid in advance by Tenant shall be refunded to it.

21. This Lease shall not be binding and in effect until a counterpart hereof has been executed and delivered by the parties each to the other. This Lease contains the entire agreement of the parties and may not be modified except by instrument in writing.

22. Reference is hereby made to a Supplement to this lease attached hereto and which is hereby incorporated herein and made a part hereof.

23. This Lease shall bind and inure to the benefit of the parties hereto and their respective heirs, representatives, successors or assigns (provided that this Lease shall not inure to the benefit of any assignee pursuant to an assignment which is not in compliance with the terms of this Lease).

IN WITNESS WHEREOF, this instrument has been duly executed by the parties hereto as of the day and year first above written.

BROOKLINE DEVELOPMENT CORP.

By (Illegible)

Title: Pres.

Landlord

INTERNATIONAL BUSINESS MACHINES CORPORATION

By (Illegible)

Title: Asst. Treas.

Tenant

(Seal)

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State of New York
County of New York

On the 25th day of September, 1963, before me personally came M. M. Koufman to me known, who, being by me duly sworn, did depose and say that he resides at Brookline, Mass. that he is the President of Brookline Development Corp., the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation and that he signed his name thereto by like order.

NORIS R. ARAUJO
Notary Public, State of New York

No. 03-5006025
Qualified in Bronx County
Commission Expires March 30, 1964

State of New York
County of New York

On the 25th day of September, 1963, before me personally came C. V. Boulton to me known, who, being by me duly sworn, did depose and say that he resides at 53 Princess Rd., (Illegible), N. J. that he is the Assistant Treasurer of International Business Machines Corporation, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order

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of the board of directors of said corporation and that he signed his name hereto by like order.

LOUIS PAPAGNI

Notary Public, State of New York

No. 24-8209725

Qualified in Kings County

Cert. filed in New York County

Commission Expires March 30, 1964

Schedule A.

ALL that tract or parcel of land situate in the City of Utica, County of Oneida and State of New York bounded and described as follows:

BEGINNING at a point on the easterly line of Genesee Street at an iron pipe marking the southwesterly corner of premises of Utica Seventh-Day Adventist Church as covered in Warranty Deed, dated June 7, 1938 executed by the Savings Bank of Utica and recorded June 7, 1938 in Liber 975 of Deeds, page 493; running thence north 60 degrees 00' east along the easterly line of Genesee Street 100 feet to an iron pipe; running thence south 29 degrees 49' east 365.76 feet to a pipe marked by an iron pipe set; running thence south 34 degrees 59' west 64.25 feet to a point marking the northwesterly corner of Lot 24 as shown on Herbert Hastings Map filed in the Oneida County Clerk's Office December 28, 1853; running thence south 54 degrees 48' east along the northerly line of said Lot 24 a distance of 60 feet; running thence south 34 degrees 59' west 100 feet to a point in the southerly line of Lot 23 as shown on said Herbert Hastings Map; running thence north 54 degrees 48' west along said southerly line as shown on said Herbert Hastings Map a distance of 60 feet to a point marking the

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southwesterly corner of said Lot 23; running thence north 34 degrees 59' east along the westerly line of said Lot 23 a distance of 53.63 feet to a point marked by an iron pipe; running thence north 29 degrees 49' west 412.53 feet to a point in the easterly line of Genesee Street, marking the point and place of beginning.

Said premises are subject to those encroachments shown on a survey of Dickens and Massi, dated June 22, 1962.

Supplement to Lease Between Brookline Development Corp. and International Business Machines Corporation Dated , 1963.

A. Landlord covenants to construct on the demised premises an air-conditioned, one-story building in accordance with the plans and specifications therefor which have been initialed by the parties hereto and made a part hereof. Landlord agrees to construct the same in good, workmanlike manner and to complete the same no later than April 1, 1964. In the event Landlord is not able to complete said building by April 1, 1964, because of causes beyond its control such as (without limitation) strikes, shortages of material, delays in transportation, acts of God and the like, then said date of April 1, 1964 shall be extended for such period, not in excess of three (3) months, as may be required on account thereof. In the event said building shall not have been completed by said date of April 1, 1964 (as the same may have been hereinabove extended on account of said causes), this lease shall, at the election of Tenant and exercised while said building shall not have been completed, terminate and in such event all rights and obligations of the parties hereto shall terminate without further liability on the part of either.

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If, pursuant to the provisions hereinabove set forth, said building is not completed until a date after April 1, 1964, the date of commencement of the term hereof shall be extended until such date and the date of termination of the original term hereof shall be extended to a date twelve (12) years thereafter. Upon completion of said building, Landlord and Tenant will enter into an agreement in recordable form setting forth said completion date as the first day of the original term hereof. Said building shall be deemed completed hereunder when the same shall be fully complete in accordance with said plans and specifications and accepted by Tenant, except only for insubstantial items which Landlord is ready, willing and able to cure within a reasonable time thereafter.

B. Landlord agrees to pay all real estate taxes and other public charges which may become a lien upon the demised premises as the same may fall due, except that Landlord shall have the right to withhold payment thereof, pay the same under protest or take any other similar lawful action it may deem appropriate in the event it chooses to make any *bona fide* protest or challenge of the amount thereof, provided Tenant is not disturbed in its use of the premises hereunder.

If the real estate taxes on the leased premises for any tax year during the term of this Lease or any extension hereof are in excess of the real estate taxes paid or payable during the first full tax year occurring after the first full assessment of the building as a fully completed building, then Tenant shall pay Landlord as additional rent during the term of this Lease and its extended term such tax increase which is properly allocable to the leased premises. The Landlord agrees that it will

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contest any assessment made against the building at the request of the Tenant and at Tenant's expense.

Notwithstanding the foregoing, Tenant shall pay when due all taxes and public charges levied against the demised premises arising from the use of or right to use water, sewage facilities and other utility type services.

C. Tenant shall indemnify and save Landlord harmless at all times during the term hereof from and against all loss, damage, cost and expense suffered or incurred by Landlord on account of any claim for any injury (including death) or damage, either to person or property, sustained by Tenant or by any other person, which arises out of the use or occupancy of the demised premises by Tenant, its servants, employees or agents, invitees, licensees, sublessees and assignees and any other person, except those resulting from the willful or negligent act or omission of Landlord, his servant, employees, agents or assignees.

Tenant shall, at all times during the term hereof, keep in effect at its sole cost and expense, in companies and upon terms and in form reasonably satisfactory to Landlord (a) public liability insurance, for the benefit of both the Landlord and Tenant, against claims for personal injury, death and property damage occurring upon, in or about the demised premises, such insurance to afford protection to the limit of not less than Three Hundred Thousand Dollars (\$300,000) in respect of injury or death to a single person, and to the limit of not less than One Million Dollars (\$1,000,000) in respect of any one accident, and to the limit of not less than One Hundred Thousand Dollars (\$100,000) in respect to property damage; (b) steam boiler insurance, for the benefit of Landlord and Tenant, on all steam boilers, if any, in an amount of at least One Hundred Thousand Dollars (\$100,000). Such

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insurance may, at Tenant's election, be carried under any general blanket coverage of Tenant, provided, however, that Tenant shall deliver to him certificates of such insurance in form reasonably satisfactory to Landlord forthwith after their issuance and shall deliver to Landlord proof of renewal of such insurance not less than ten (10) days prior to the expiration of any policy. Such certificates shall provide for not less than ten (10) days' notice to Landlord prior to cancellation of such insurance.

D. Tenant shall pay when due all charges for fuel, water, gas, electricity, power and other utilities, services and all other charges (except for those charges, if any, which are the responsibility of the Landlord) whatsoever incurred during the term of the use, occupation, operation or maintenance of the demised premises.

E. The failure of either Landlord or Tenant to insist upon a strict performance of any of the agreement's terms, covenants and conditions hereof shall not be deemed a waiver of any rights or remedies that either may have and shall not be deemed a waiver of any subsequent breach or default in any of such agreements, terms, covenants and conditions.

F. The Tenant covenants that, in case of termination of the Lease pursuant to Paragraph 11 thereof, the Tenant will forthwith pay to the Landlord as damages a sum equal to the amount by which the rent and other charges (as calculated for the immediately preceding lease year) called for hereunder for the remainder of the term exceed the fair rental value of said premises for the remainder of the term, and in addition thereto will furthermore indemnify the Landlord against all reasonable loss and damage suffered by reason of such termination, however caused, first deducting any damages paid as above provided, the loss and damage, if any, for

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each rent payable period during the remainder of the term to be paid at the end of each such next payment period. The foregoing rights of Landlord shall be **additional to and not in limitation** of any other rights he may otherwise have.

G. Tenant agrees at Landlord's request to subordinate this Lease to any mortgage (or like lien) hereafter put on the demised premises, provided the holder thereof gives to Tenant a written assurance (in form reasonably satisfactory to Tenant) that upon payment of the rent and performance of its other obligations or required hereunder, Tenant will not be disturbed in its possession of the demised premises or exercise of any of its other rights hereunder.

H. Tenant agrees at Landlord's request to agree in writing with any mortgagees (or other parties holding a similar interest in the demised premises) which are prior in effect or priority to this Lease to tract this Lease and all Tenant's rights hereunder in all respects as if this Lease were prior in effect or priority to such mortgage or other interest.

I. Tenant agrees that in the event so much of the area required for parking is taken so as to permit Tenant to terminate under Paragraph 15 of the Lease, then if Landlord is able, within ninety (90) days of the date Tenant's right to terminate arises, to provide adequate adjacent other land to enlarge the remaining parking area to a size which if originally remaining after any taking would not permit Tenant to terminate, then this Lease shall not terminate but remain in full force and effect, except that rent shall abate for that portion taken.

J. At any time during the term hereof, Tenant may require Landlord to build a four thousand (4,000) square

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foot addition on the demised premises adjoining and to the rear of the then existing building. The plans and specifications therefor are to be prepared by Landlord, but Landlord shall not be obligated to commence construction until Tenant has given its approval thereof in writing. Upon completion of said addition, Tenant shall pay to Landlord additional rent therefor at the rate of Two Dollars and Twenty-five Cents (\$2.25) per annum per square foot (outside dimensions) of such addition, said rent to be paid in equal monthly installments in the same manner as the original rent hereunder. In addition, Tenant shall be responsible for all taxes attributable thereto and upon completion thereof said addition shall in all other respects fall under the terms and provisions of this lease. If, upon completion of said addition, the remaining unexpired term of this Lease is less than eight (8) years, the same shall hereupon automatically (and without the requirement of any act by either party hereto) be extended for a period of time sufficient to bring said remaining unexpired term to a total period of eight (8) years. However, Tenant's rights under Paragraph 14 of this Lease shall not be affected by this provision.

K. At any time during the term hereof (provided the addition referred to in "J" above has been required and completed), Tenant may require Landlord to build a second floor over the entire building then located on the demised premises, the same to be of the same general design and type of construction as said existing building. The plans and specifications therefor are to be prepared by Landlord but Landlord shall not be obligated to commence construction until Tenant has given its approval thereof in writing. Upon completion of said second floor, Tenant shall pay to Landlord additional rent therefor at the rate of One Dollar and Seventy-five

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Cents (\$1.75) per annum per square foot (outside dimensions) of such second floor, said rent to be paid in equal monthly installments in the same manner as the original rent hereunder. In addition, Tenant shall be responsible for all taxes attributable thereto, and upon completion thereof said addition shall in all other respects fall under the terms and provisions of this Lease. If, upon completion of said second floor, the remaining unexpired term of this Lease is less than ten (10) years, the same shall thereupon automatically (and without the requirement of any act by either party hereto) be extended for a period of time sufficient to bring said remaining unexpired term to a total period of ten (10) years. However, Tenant's rights under Paragraph 14 of this Lease shall not be affected by this provision.

L. At the end of the original term of this Lease, the Tenant shall have the option to purchase the demised premises, together with all improvements then located thereon for the sum of Two Hundred Thirty Thousand Dollars (\$230,000.00). This option shall be exercised by written notice to the Landlord. Conveyance shall be made at the appropriate Registry of Deed's upon such date as may be specified in such notice, not earlier than twenty (20) days nor later than one hundred twenty (120) days thereafter. At the time for conveyance, the Landlord shall deliver to the Tenant a good and sufficient deed conveyance (except for involuntary transfers such as takings and the like) the Landlord's present interest in the demised premises to the Tenant or its nominee. So much of applicable taxes as are Landlord's obligation under this Lease shall be apportioned as of and at the time of the delivery of said deed. The deed is to be delivered and the consideration paid, in cash, unless otherwise agreed upon in writing, at noon of the date

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fixed for conveyance, at the Registry District in which said deed should by law be registered. The tender of said deed shall be deemed to be a full compliance by the Landlord with its agreement to convey as aforesaid. Landlord may, if it so desires, at the time of the delivery of said deed, use the purchase money or any portion thereof to clear the title of any or all encumbrances or interests provided that all instruments necessary for this purpose are registered by and at the expense of said Landlord simultaneously with the delivery of the deed. However, in the event of any condemnation of the premises, or in the event that Tenant exercises its rights to expand under the terms of Paragraphs "J" and "K" hereof, the parties hereto agree that they will enter into a new purchase agreement upon a price to be negotiated within a reasonable time after such condemnation or such expansion shall have taken place.

If Landlord shall be unable to give title or to make conveyance as stipulated, Landlord agrees to reimburse Tenant for all costs incurred in examining title, including but not limited to the cost of any survey, and upon such refund and payment being made, all obligations of either party under this Paragraph "L" shall cease and this Paragraph "L" shall be void without recourse to either party, provided, however: (a) if, on the date fixed above for conveyance, a period of thirty (30) days shall not have expired after notice from the Tenant of defect in title, the time for performance shall, if either party so elects, be extended for the purpose of curing such defect until the expiration of such period; and (b) if the Tenant so elects, at either the original or extended time for performance, to pay said purchase price without deduction for defects in title, Landlord shall convey such title as they have to the premises in their then condition.

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The acceptance of a deed and possession by Tenant or the Tenant's nominee shall be deemed to be a full performance and discharge of every agreement and obligation herein contained or expressed.

Time shall be of the essence under this Paragraph "L".

IN WITNESS WHEREOF, the parties hereto have set their hands and seals concurrently with the exception of the Lease dated September 25th, 1963 made between them.

BROOKLINE DEVELOPMENT CORP.

By (Illegible)

Title: Pres.

Landlord

INTERNATIONAL BUSINESS MACHINES CORPORATION

By (Illegible)

Title: Asst. Treas.

Tenant

**Exhibit III, Annexed to Affidavit of Thomas F. Daly—
Lease, Dated May 22, 1964.**

THIS LEASE made as of the 22nd day of May, 1964, between The Brooklyn Savings Bank, a New York corporation having its principal office and place of business at 211 Montague Street, Brooklyn, New York, hereinafter called the "Landlord", and International Business Machines Corporation, a New York corporation having its principal office at 590 Madison Avenue, County, City and State of New York, hereinafter called the "Tenant".

WITNESSETH:

That the Landlord hereby leases to the Tenant, and the Tenant hereby hires and takes from the Landlord the following described premises: a portion of the fourth floor and all of the fifth floor of the building known as 211 Montague Street, as outlined in red on the plan (consisting of 2 sheets) annexed hereto, made a part hereof and marked Exhibit "A", to be used and occupied by the Tenant for offices, sales, display, engineering service and repair to the Tenant's products and equipment, training of the Tenant's employees and customers, and all purposes incidental and related to an IBM Branch Sales Office, as set forth in Tenant's letter to Landlord dated December 20, 1963, for a term to begin on the 1st day of July, 1964, or when premises are ready for occupancy, whichever is earlier, and to end on the 30th day of June, 1969, subject to extension as may be hereinafter provided, at the annual rent of Ninety-Three Thousand Dollars (\$93,000.00), payable in monthly installments in advance of \$7,750.00 one each on the first day of every calendar month during the term. Rent for any period of less than one month shall equal 1/20th of the monthly rent for each day of such period.

It is understood that Tenant will perform certain work in the demised premises in order to make the leased space

Exhibit III, Annexed to Affidavit of Thomas F. Daly

suitable for its use. The materials and workmanship shall be at least equal to those in the finished portion of Tenant's branch office at 42nd Street and Madison Avenue, New York City, and no work shall be begun until plans and specifications have been submitted to and approved by Landlord, its architects and engineers, which approval shall not be unreasonably withheld.

Tenant estimates that the actual cost of installing necessary improvements will be at least \$143,000.00 (exclusive of architect's and engineer's fees). It is agreed that Tenant may credit itself with respect to each monthly rental payment during the original 5 year term with 1/60th of \$143,000.00 or the actual cost of said improvement (exclusive of architect's and engineer's fees) whichever amount shall be less.

This lease is granted and accepted upon the following terms, covenants and conditions, and the Landlord and Tenant hereby agree to keep and perform all the terms, covenants and conditions hereof on its part to be kept and performed.

1. Payment of Rent

The Tenant will pay said rent without deduction or demand (except as to the credit set forth above), to The Brooklyn Savings Bank, at 211 Montague Street, Brooklyn 1, New York, or to such other person or at such other place as the Landlord may designate in writing.

2. Landlord's Title and Allowable Use

The Landlord covenants as a condition of the lease that it has good marketable title to the premises and right to make this lease for the term aforesaid; that it will deliver possession of the premises to the Tenant at the commencement of the term; and that the premises may lawfully be used by the Tenant for the uses hereinabove expressed.

*Exhibit III, Annexed to Affidavit of Thomas F. Daly**3. Building and Equipment*

The Landlord will, prior to the commencement of the term, put the premises and all building service lines and equipment (including, without limitation, plumbing, electrical, heating, ventilating, air conditioning and elevators) in good repair and condition (it being understood that certain work is to be performed by Tenant as shown on plans and specifications which have been identified by initials of the parties), and will maintain them in such condition throughout the term of the lease, making replacements where necessary. The Landlord shall further keep in repair all portions of the structure (including, without limitation, the foundation, walls, glass in exterior walls and doors, floors, ceilings, roof) and the exterior of the premises including grounds.

In the event that the Landlord fails to make any repairs or replacements which it is required to make hereunder within a reasonable time specified in a written notice by the Tenant, then in that event the Tenant may make such repairs and deduct the cost thereof from the rent due or to accrue hereunder.

Tenant is to assume all risk of damage or injury to Landlord's premises during the course of preparation of premises and will make good any damage or injury to such premises upon demand, and Tenant will further assume all risk of injury to any person or persons in or about said premises arising out of such work. Tenant will assume the responsibility of obtaining any and all permits or licenses required to be obtained from any municipal or other governmental authority having jurisdiction, including but not limited to building permits and underwriters' certificates. All work and materials shall conform with the requirements of governmental authorities or agencies having jurisdiction and no installation shall be made which will jeopardize or prevent the issu-

Exhibit III, Annexed to Affidavit of Thomas F. Daly

ance and maintenance of a certificate of occupancy for the Landlord's premises.

No changes or decorating schemes shall be used which will change the exterior appearance of the building.

4. *Services*

The Landlord shall at its own cost and expense furnish to the Tenant the following services and utilities: (1) Necessary elevator facilities on business days from 8:00 a.m. to 6:00 p.m. and on Saturdays from 8:00 a.m. to 1:00 p.m., and an elevator subject to call at all other times; (2) Heat and air conditioning on business days from 8:00 a.m. to 6:00 p.m. and on Saturdays from 8:00 a.m. to 1:00 p.m.; (3) Cleaning and janitor service, including removal of refuse and rubbish and furnishing washroom supplies, as required by the specifications attached hereto and made a part hereof; (4) Hot and cold running fresh water for lavatory purposes; (5) Electricity for lighting and operation of the Tenant's office machines, appliances and equipment; and (6) All necessary light bulbs and tubes.

The electricity and water to be furnished shall be such electricity and water as can be furnished within the limitations of Landlord's present electrical and water systems, of which Tenant has knowledge, and Landlord shall not be required to alter or increase its existing facilities in order to furnish Tenant with water or electricity. Landlord represents that its present electrical and water systems are adequate to service the area leased to Tenant as a normal business and sales office. In the event Tenant installs equipment such as, but not limited to, computers which would unduly increase the use of electricity and/or water, Tenant will reimburse Landlord for additional electric and water charges on a metered basis at Landlord's cost without any profit factor.

Exhibit III, Annexed to Affidavit of Thomas F. Daly

When heating or air conditioning is required by Tenant other than as hereinbefore set forth, Tenant will give reasonable prior notice of its desire for such heat or air conditioning which will be supplied during hours and days other than those hereinbefore specified at the rate of \$12.00 per hour for each hour or fraction thereof.

It is understood that Landlord reserves the right to reasonably stop service of heating, water, air conditioning or electricity or elevators when necessary by reason of accidents, repairs, alterations or improvements. The Landlord shall have no responsibility or liability for failure to supply such services when it is prevented from doing so by strikes, accident or other cause beyond its reasonable control. Landlord shall use reasonable dispatch in making such alterations, repairs and improvements.

5. *Interior Maintenance*

The Tenant shall maintain the interior of the premises and shall replace all interior glass in the premises broken or damaged during the term as it may be extended with glass of equal character, unless the same shall be broken by fire, the elements or casualty or causes beyond Tenants' control, or the Landlord's negligence. At the expiration of the term, the Tenant will remove its goods and effects (except as elsewhere provided herein) and will peaceably yield up to the Landlord the leased premises in as good order and condition as when delivered to it, excepting ordinary wear and tear, repairs hereby required to be made by the Landlord, damage by fire, the elements and casualty, and the Landlord's negligence.

The Tenant will repair all damage or injury to the premises, fixtures, appurtenances and equipment, or to the building, caused by the Tenant's installation or removal of its property or resulting from the negligence or tortious conduct of the Tenant, its servants, employees, agents or visitors.

*Exhibit III, Annexed to Affidavit of Thomas F. Daly**6. Compliance with Regulations*

The Tenant agrees to comply with all the rules and regulations of the Board of Fire Underwriters, Officers or Boards of the City, County or State having jurisdiction over the leased premises, and with all applicable laws, ordinances, regulations and legal requirements as any of the foregoing pertain to the manner in which the Tenant shall use the leased premises and to the conduct of the Tenant's business. The Landlord agrees to comply with all such rules, regulations and applicable laws, ordinances, and legal requirements which affect the building or the premises or which require structural repairs or alterations, changes or additions to the premises, building or building equipment, or any part of either.

7. Improvements and Alterations

The Tenant may place such temporary partitions, fixtures (including lighting fixtures), personal property, machinery, motors and the like, in the leased premises and may make such improvements and alterations in the interior thereof as it may desire at its own expense. All such things heretofore or hereafter made or installed shall remain the property of the Tenant, and in case of damage or destruction thereto by fire or other causes, the Tenant shall have the right to recover as its own loss from any insurance company with which it has insured the same, notwithstanding the fact that any of such things might or could be considered to be a part of the leased premises. The Tenant may remove all or any of such things prior to or at the expiration of this lease. It is agreed that only an express abandonment in writing shall affect the Tenant's ownership of any such things, except that the Tenant may abandon the same, in whole or in part, to the Landlord at the end or other expiration of the term by vacating the premises without removing the same. In the event of the removal of such

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things or any of them, the Tenant shall not be required to remove pipes, wires and the like from the walls, ceilings or floors, provided that the Tenant properly cuts, caps and disconnects such pipes and wires and seals them off, if necessary, in a safe and lawful manner. The provisions of this paragraph shall not apply to permanent partitions, lighting and electrical fixtures, plumbing equipment and facilities, air conditioning equipment, nor to any other items reasonably permanently affixed to the building.

8. Inspection

The Landlord shall have the right at all reasonable times during the term of this lease to enter the leased premises for the purpose of examining or inspecting the same and of making such repairs or replacements therein as may be required by this lease or as the Landlord shall deem necessary; provided, however, that the Landlord shall use all reasonable effort not to disturb the Tenant's use and occupancy.

9. Assignment

The Tenant may assign this lease or sublet all or any part of the premises at any time covered hereby without consent of the Landlord. However, the Tenant will advise the Landlord of any such changes. In any event, the Tenant shall remain responsible for the faithful performance of all of the covenants, terms and conditions hereof on the Tenant's part to be performed.

10. Casualty

In the event that 50% or more of the leased premises or the buildings shall be damaged by fire, the elements, casualty, war, insurrection, riot, public disorder or other similar cause or happening, the Tenant shall have the option to be exercised within thirty (30) days of the date of destruction of terminating this lease. In the event of termination, adjustments in rental and all other adjust-

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ments shall be made to the date of destruction. In the event that less than 50% of the leased premises shall be damaged as above or in the event that the Tenant does not exercise its option afforded under this paragraph, then the lease shall continue, but the Tenant shall be entitled to a full abatement of rent for the period during which the leased premises are rendered untenable or incapable of use for the purpose for which the same are being used at the time of the damage. In the event this lease continues, the Landlord shall at its own expense as soon as practicable repair the damage and restore the premises and/or the buildings to its original condition.

The Landlord shall maintain insurance, covering the building and premises in an amount equal to at least 80 percent of replacement cost thereof exclusive of excavations and foundations, against loss or damage by fire and the perils specified in the standard extended coverage endorsement.

11. Default

If the Tenant shall default in the performance of any of its obligations pursuant to this lease and if such default shall continue for thirty (30) days after written notice thereof by the Landlord to the Tenant (except that if the Tenant cannot cure any such default within said thirty days period, said period shall be extended for a reasonable additional period, provided that the Tenant commences to cure such default within said thirty day period and proceeds diligently thereafter to effect such cure), or if the Tenant shall be adjudicated bankrupt or insolvent according to law, or shall make an assignment for the benefit of creditors, then and in any of said cases, the Landlord may lawfully enter into and upon said premises or any part thereof in the name of the whole, and repossess the same as of the former estate of the Landlord and expel the Tenant and those claiming under

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the Tenant without being deemed guilty of any manner of trespass and without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant, and upon entry as aforesaid, this lease shall terminate and the Tenant covenants that in case of such termination, it will indemnify the Landlord against all unavoidable loss of rent which the Landlord may incur by reason of such termination during the residue of the term above specified.

12. Holdover

If the Tenant remains in the premises beyond the expiration date of this lease, as it may have been extended or renewed, such holding over in itself shall not constitute a renewal or extension of this lease, but in such event a tenancy from month to month shall arise, subject to payment of the same rent by the Tenant each month as that payable on account of the last month of the demised term.

13. Quiet Enjoyment

The Tenant, on paying the said rent and performing the covenants of this lease on its part to be performed, shall and may peaceably and quietly have, hold and enjoy the demised premises for the term aforesaid and any extension or renewal thereof.

14. Renewal

The Tenant may, at its option, extend the term of this lease for not more than 3 further terms of 1 year each, upon the same terms and conditions, by giving written notice to the Landlord in the manner herein provided, of its intention to extend at least 6 months prior to the end of the then term, and thereupon the term of this lease shall be so extended without any further action by either party.

*Exhibit III, Annexed to Affidavit of Thomas F. Daly**15. Condemnation*

In the event that 10% or more of the leased premises are taken in condemnation proceedings or by any right of eminent domain or for any public or quasi public use or purpose, the Tenant shall have the option, to be exercised not later than thirty (30) days from the effective date of taking, to terminate this lease as of the effective date of the taking, and in the event of such termination adjustments in rental and all other adjustments shall be made to the effective date of such taking. In the event that less than 10% of the premises are taken or if the Tenant does not exercise the option afforded it under this paragraph, then this lease shall continue, but the rent shall be diminished in the proportion that the floor area of the part taken shall bear to the total floor area of the leased premises immediately prior to such taking. In the event the lease continues, the landlord shall at its own expense immediately repair such damage to the premises and the building as shall have been caused by the taking; provided, however, that if the Landlord shall fail promptly to proceed with and complete such repairs, the Tenant may make such repairs, or so much thereof as shall be reasonably required thoroughly to protect the demised premises, to restore the same as nearly as may be to their former condition and to fit them for business purposes, for the account and at the expense of the Landlord, and the Landlord will, upon receipt of a statement of the cost of such repairs from the Tenant, reimburse the Tenant for all expenditures reasonably made by it in making the same and in default of such reimbursement the Tenant may deduct the amount of such expenditures from the rent due or to come due hereunder. If this lease continues as above, during the period of restoration and repairs, the rent shall be abated for the period and to the extent that the premises may be untenable or incapable of use by the Tenant.

Exhibit III, Annexed to Affidavit of Thomas F. Daly

However, nothing herein contained shall be deemed to prevent the Tenant, at its own cost and expense, from participating in any proceedings commenced against the Landlord, for the condemnation of all or a part of the building of which the demised premises form a part. The Tenant shall have the right to participate proportionately with the Landlord in any award made in such condemnation proceedings to the extent that any expenditures by the Tenant may have resulted in capital improvement to the building, and as to the same may be reflected in any such award.

16. Notices

In every case, when under the provisions of this lease it shall be necessary or desirable for the Tenant to serve any notice or demand on the Landlord, such notice or demand shall be served personally or by registered mail addressed to the Landlord at its address listed in Page 1 hereof, until otherwise directed in writing by the Landlord, and any such notice or demand to be given to the Tenant shall be served personally, or by registered mail addressed to the Tenant's Administration Manager at the leased premises and copies of such notice shall be served simultaneously by registered mail on the Tenant, attention of the Real Estate and Construction Division, 1000 Westchester Avenue, White Plains, New York, and attention of The Real Estate Administrator, International Business Machines Corporation, 425 Park Avenue, New York 22, New York until otherwise directed in writing by the Tenant.

17. Signs

The Tenant shall have the privilege of placing on the premises or attaching to the exterior of the building its standard IBM sign, the placing and size of which has been submitted to Landlord and approved by it. No other signs may be maintained in or on the premises or building.

*Exhibit III, Annexed to Affidavit of Thomas F. Daly***18. Taxes**

The Landlord shall pay on or before the last day on which they may be paid without penalty or interest all real estate taxes, assessments, and other governmental charges which shall be levied or assessed or which become liens upon the leased premises during the lease term. It is hereby agreed that, upon ten (10) days' written notice to the Landlord, the Tenant may pay delinquent taxes, assessments or other charges affecting the premises, and make payments pursuant to, or cure any defaults in, the terms of any mortgage, security deed, or deed of trust affecting the demised premises, which is prior in lien or effect or paramount to this lease, and upon such written notice the Tenant may pay and discharge, in installments or otherwise, any other charges, liens or encumbrances which may jeopardize the Tenant's right of possession or interest pursuant to this lease; and in such event the Tenant may set off any such payment against the rent due or to become due under this lease and/or the Tenant, upon written notice to the Landlord, may demand reimbursement therefor, or part thereof, from the Landlord, and the Landlord covenants to promptly reimburse the Tenant after such notice and demand.

19. Other Tenants

The Landlord covenants and agrees that during the term of this lease and any renewal or extension thereof, it will not sell or lease any part of such building or any adjoining property which the Landlord may own or control to any person, firm or corporation manufacturing, selling, dealing or trading in products or offering service similar to or for like purposes as the products and service offered by the Tenant, such as accounting, punched card, tabulating and data processing machines, equipment, sys-

Exhibit III, Annexed to Affidavit of Thomas F. Daly

tems and devices, office equipment, typewriters, and supplies for such machines, equipment, systems or devices or any of them, and service therefor.

20. Execution

This lease shall not be binding and in effect until a counterpart hereof has been executed and delivered by the parties each to the other. This lease contains the entire agreement of the parties and may not be modified except by instrument in writing.

21. Successors in Interest

This lease shall bind and inure to the benefit of the parties hereto and their respective heirs, representatives, successors or assigns (provided that this lease shall not inure to the benefit of any assignee pursuant to an assignment which is not in compliance with the terms of this lease).

22. Miscellaneous

Landlord shall not be liable for any damage to Tenant's property by Landlord's employees or agents, provided such damage is not due to the negligence of the Landlord or its employees and agents, and it shall not be liable for any injury or damage to persons or property resulting from steam, gas, electricity, falling plaster, water, rain or snow which may leak from any part of the building or from the pipes, appliances or plumbing works of the same, or from any other place, or from dampness or other cause of whatever nature unless caused by Landlord's negligence.

Tenant shall reimburse Landlord for all expenses incurred or suffered by reason of any breach, violation or non-performance by Tenant or its servants, employees or agents of any covenant or provision of this lease, or by reason of damage to persons or property caused by

Exhibit III, Annexed to Affidavit of Thomas F. Daly

moving Tenant's property in or out of the building or by the installation or removal of furniture or other property of Tenant's, or caused by Tenant or its agents, servants or employees or independent contractors performing work in or about the premises in behalf of Tenant in the course of preparing premises for Tenant's occupancy or arising out of the carelessness, negligence or improper conduct of Tenant or its servants, employees or agents or independent contractors in the use or occupancy of or otherwise in relation to the demised premises.

Tenant will assume complete responsibility for the breakage of any exterior windows or glass in the demised premises caused by the negligence of Tenant, its servants, employees, agents or independent contractors, or arising out of Tenant's occupancy of the demised premises.

Tenant will indemnify and hold harmless the Landlord against all claims and demands whatsoever for injury or injuries to any person or persons and/or damage to any property occurring in or about the demised premises, and shall furnish to Landlord a certificate of insurance in the usual form evidencing public liability coverage against personal injury and property damage in the amount of at least \$100,000/\$300,000 personal injury and at least \$10,000 property damage.

Tenant represents that no activities on its part in the demised premises will be of such nature as to increase the risk of casualty to Landlord's premises in such manner as to increase the amount of premium payable on Landlord's fire and extended coverage insurance. In the event that it is determined that any such increase is due to Tenant's activities, Tenant will reimburse Landlord for the amount of such increase.

Neither Landlord nor its agents or anyone acting in its behalf has made any representations or promises with respect to demised premises except as expressly set forth

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herein, and Tenant agrees that it has inspected the premises covered by this lease and has examined the plans thereof and is fully familiar with the space and with the condition thereof.

IN WITNESS WHEREOF, this instrument has been duly executed by the parties hereto as of the day and year first above written.

THE BROOKLYN SAVINGS BANK

By Paul F. Ely

President

Landlord

INTERNATIONAL BUSINESS MACHINES CORPORATION

By B. H. Askew, Controller

Tenant

Real Estate and Construction Division

RIDER A—Attached and Made a Part of Lease Dated May 22, 1963, Between The Brooklyn Savings Bank and International Business Machines Corporation, Covering a Portion of the Fourth Floor and all of the Fifth Floor of the Building Known as 211 Montague Street, Brooklyn, New York

Anything in the lease to the contrary notwithstanding, the parties agree as follows:

1. The term "business days" as used in Paragraph 4 of the lease means, Mondays through Fridays in each week, excluding holidays observed by the Tenant.

2. Supplementing the specifications for cleaning and janitor service to be provided by the Landlord, the Landlord agrees that the cleaning and janitor service to be provided to the Tenant will be equal in kind and quality and will be furnished on the same basis and schedule as

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the cleaning and janitor service which it provides for premises occupied by the Landlord in the same building.

3. The last sentence of Paragraph 7 of the lease shall be deemed deleted and shall have no force or effect. The Tenant agrees that the improvements to the premises which it provides before taking occupancy, as described in the plans and specifications approved by the Landlord in accordance with Page 2 of the lease shall not be subject to removal by the Tenant from the premises and shall become the property of the Landlord. In the event that the lease is terminated because of damage to the leased premises or the building by fire or other casualty, as provided in Paragraph 10 of the lease, then the Landlord agrees to pay promptly to the Tenant a sum equal to \$143,000.00, or the actual cost of said improvements (exclusive of architects' and engineers' fees), whichever amount shall be less, less 1/60 of said amount for each month of the term of the lease which has elapsed from the commencement of the term to the date of such damage or destruction.

4. The Tenant shall have no liability to the Landlord or its insurer or insurers, regardless of the Tenant's fault or negligence, in the event of damage or destruction to the leased premises or the building because of fire or any of the other perils covered by insurance pursuant to the standard fire insurance extended coverage rider.

5. Landlord will install all new light bulbs and tubes required by the Tenant as and when necessary.

6. The Landlord's obligation to supply heat and air-conditioning to the demised premises as provided in paragraph 4 of the lease is amplified as follows: The Landlord shall deliver to the Tenant's premises heat or cool dehumidified air adequate to properly heat or cool the leased premises under conditions of normal office occupancy, providing lighting loads and population do not ex-

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ceed building standards which are set forth as 5½ watts per square foot and 100 square feet per person. Said heat or cool dehumidified air shall be deemed adequate if sufficient heat and cool air are delivered to the demised premises to maintain a temperature of at least 70° Fahrenheit when the outdoor temperature is 0° Fahrenheit and a maximum temperature of 78° Fahrenheit when the outside temperature is 95° Fahrenheit. Said air shall also be sufficiently dehumidified in summer to maintain a maximum relative humidity of 50% within the conditioned space; it being understood that the relative humidity during the heating season will be considerably lower in order to avoid condensation on the windows.

7. The Tenant's obligation to indemnify and hold harmless the Landlord against all claims and demands for injury to persons and damage to property shall be limited to instances where such injuries or damage occur because of the fault or negligence of the Tenant or its servants, employees or agents.

THE BROOKLYN SAVINGS BANK

By Paul F. Ely

INTERNATIONAL BUSINESS MACHINES CORPORATION

By B. H. Askew, Controller

Real Estate and Construction Division

BUILDING SERVICE REQUIREMENTS

DAILY

1. All floor areas to be broom swept and dry mopped and/or vacuumed.
2. Empty and clean all waste baskets and ash trays and remove all trash.

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3. Hand dust and clean all office furniture, fixtures, window sills, moldings, radiators, door louvres and ventilating louvres within reach.
4. Remove all finger prints, smudges and marks from metal partitions, doors, and other surfaces within reach.
5. Clean rest rooms:
 - a. Clean lavatories, washing floors using a high coefficient disinfectant.
 - b. Wash all seats with soap and water.
 - c. Wash all fixtures, using scouring powder to remove stains.
6. Supply and install all necessary soap, toilet tissues and paper towels.

WEEKLY

1. Damp mop and polish floors.

MONTHLY

1. All floor areas to be washed and waxed, using non-slip material and machine polished.
2. All windows to be cleaned inside and out.

QUARTERLY

1. Vacuum drapes and hangings.
2. Dust all picture frames, charts, graphs and similar wall hangings not reached in nightly cleanings.
3. Dust all books while in place in bookcase.

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4. Clean all pipes and other horizontal surfaces not reached in nightly cleanings.

SEMI-ANNUALLY

1. Dust all closets and damp mop closet floors.
2. Wash and polish all marble walls and wainscoats.

ANNUAL

1. Dust ceiling surfaces.
2. Dust and clean all vertical surfaces, such as walls, partitions, doors, louvres and other surfaces not reached in nightly, weekly, quarterly, or semi-annual cleanings.
3. All light fixtures to be washed and cleaned.

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IBM

International Business Machines Corporation

DATA PROCESSING DIVISION

186 Joralemon Street

Brooklyn 1, New York

ULster 8-7000 (Area Code: 12)

March 31, 1964

Mr. Thomas S. Sites
Vice President
Brooklyn Savings Bank
211 Montague Street
Brooklyn 1, New York

Dear Mr. Sites:

Regarding your request on the size of the external sign planned for use by the Montague entrance, I am pleased to advise that the overall area of the three letters, "IBM" will be approximately 1 foot by 3 feet. Since these are made up to order, I am sure we can work it out to be architecturally appropriate.

Very truly yours,

C. M. FREEMAN
Branch Manager

CMF:ed

**Exhibit IV, Annexed to Affidavit of Thomas F. Daly—
Lease, Dated November 30, 1962.**

THIS LEASE, made as of the 30th day of November, 1962, between J. ROBERT BALDWIN and ARTHUR W. BALDWIN, residing at 1002 State Street, Erie, Pennsylvania (hereinafter called "Landlord"), and INTERNATIONAL BUSINESS MACHINES CORPORATION, a New York Corporation, having its principal office at 590 Madison Avenue, in the City, County and State of New York (hereinafter called "Tenant").

WITNESSETH:

That Landlord hereby leases to Tenant, and Tenant hereby hires and takes from Landlord, the following described premises: Approximately 7,532 rentable square feet of floor space located on the first floor of a two-story building now being constructed by Landlord on a site bounded on the South by Wyoming Avenue, on the East by Mulberry Street, and on the North by Oakford Court, in the City of Scranton, State of Pennsylvania, more particularly described in Exhibit "A" and Exhibit "B" attached hereto and made a part hereof, together with approximately 700 square feet in the basement, to be used as a storage area and/or shelter for the exclusive use of Tenant, more particularly described on the attached plans initialled by both Landlord and Tenant, said plans being incorporated in and made part of this Agreement. The premises shall be used and occupied by Tenant for offices, sales, display, engineering services and repair of Tenant's products and equipment, and all other purposes incidental and related therein, and for other lawful business and commercial purposes.

This Lease is granted and accepted upon the following terms, covenants and conditions, and Landlord and Tenant hereby agree to keep and perform all the terms, covenants and conditions hereof on its part to be kept and performed:

Exhibit IV, Annexed to Affidavit of Thomas F. Daly

1. The Lease term shall be for a period of nine (9) years, unless extended as provided later herein, said terms to commence on the first day of the month after the building is completed (in accordance with the plans and specifications heretofore approved), as certified to by Landlord's architect and accepted by Tenant, which acceptance will not be unreasonably withheld or delayed, and terminating on the last day of the month in which the term commenced, nine years thereafter. Rent for any period of less than one month shall equal one-thirtieth (1/30th) of the monthly rent for each day of such period. Landlord must construct the building as rapidly as possible after Tenant has approved the final specifications, plans and construction drawings. It is the intention of the parties that the building will be ready for occupancy on or before April 1, 1963, and Landlord must use his best efforts to complete it by that date.

2. Tenant shall pay an annual rental of \$17,500.00 for the first floor and basement space, payable in twelve (12) equal monthly installments on the first day of each calendar month, during the term, in advance, said rent being computed as follows:

The annual rental for the 7,532 square feet of rentable space on the first floor shall be \$16,450.00. The annual rental for the 700 square feet of storage and shelter space in the basement shall be \$1,050.00.

3. The Landlord covenants as a condition of the Lease that it has good marketable title to the premises and right to make this Lease for the term aforesaid; that it will put the premises and all building equipment (including, without limitation, all plumbing, electrical, heating and air conditioning equipment) in good repair and condition at the commencement of the term; that it will deliver possession of the premises to Tenant at the commencement of the term; and that the premises are fit and may lawfully be used by Tenant for the uses hereinabove expressed.

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The building is to be completed in all respects, including but not limited to, landscaping, curbing, curb cuts, driveways, sidewalks, sewer and hose connections, etc., at the commencement of this lease.

4. Tenant will pay said rent without deduction or demand to J. Robert Baldwin and Arthur W. Baldwin at 1002 State Street, Erie, Pennsylvania, or to such other person or at such other place as Landlord may designate in writing.

5. Landlord covenants as a condition of the Lease, that the premises will be furnished with an adequate water supply and all necessary air conditioning, heating, lighting and plumbing fixtures and equipment. Landlord will furnish all necessary electric light and power service lines, including proper wiring in the leased premises.

6. The Tenant shall keep the premises in as good order and condition and repair as when delivered to it, excepting ordinary wear and tear, damage by fire, the elements and casualty, and the Landlord's negligence, and further excepting those repairs and replacements which are expressly stated herein as the Landlord's responsibility. The Tenant shall be responsible for ordinary interior repairs to the leased premises and for minor repairs to and normal maintenance of the building equipment serving the leased premises.

The Landlord shall be responsible for "major repairs" to and replacement of building equipment such as heating, air conditioning, plumbing, mechanical and electrical and similar fixtures (except bulb replacements), appurtenances and equipment where such repairs and replacements are necessary because of defective material, faulty installation and normal wear, tear and decay or by fire and other casualty. "Major repairs and replacements" shall include any single repair or single replacement which costs in excess of One Hundred and Fifty Dollars (\$150.00).

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The Landlord shall keep in repair the roof and exterior of the building and shall be responsible for exterior building repairs and maintenance including, without limitation, the foundation, walls, floors, ceilings, levelator and elevator, driveways and sidewalks, parking area and grounds, and for repairs and replacements made necessary by structural failures and defects, except where such repairs and replacements are required because of Tenant's negligence.

At the expiration of the term, Tenant will remove its goods and effects (except as elsewhere provided herein) and will peaceably yield up to Landlord the leased premises in as good order and condition as when delivered to it, excepting ordinary wear and tear, repairs hereby required to be made by Landlord, damage by fire, the elements and casualty, and Landlord's negligence. In the event that Landlord fails to make any repairs or replacements, which it is required to make hereunder within a reasonable time specified in a written notice by Tenant, then in that event Tenant may make such repairs and deduct the cost thereof from the rent due or to accrue hereunder.

7. Tenant will repair all damage or injury to the premises, fixtures, appurtenances and equipment, or to the building caused by Tenant's installation or removal of furniture, fixtures or other property or resulting from the negligence or tortious conduct of Tenant, its servants, employees, agents or visitors.

8. Landlord shall furnish all services and utilities to the entire building, including the leased premises. Tenant agrees to reimburse Landlord its share of the actual costs incurred by Landlord for such services and utilities in the same ratio that Tenant's rentable area bears to the total rentable area of the building. Tenant's rentable area and the rentable area of the second floor shall be deemed each to comprise a floor area of 7532 square feet, so that the building shall be deemed to have a total

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rentable area of 15,064 square feet. It is therefore agreed that the percentage of Tenant's area of the building area is, for the purpose of the provisions of this paragraph, fifty per cent (50%). In the event that the final plans and specifications show that the building area has been increased or decreased, the percentage of Tenant's area to the building area shall be adjusted in the same ratio. However, Tenant shall have the right at any time during the term of this Lease or its extended term or terms, to provide its own janitorial and cleaning services to its leased premises, in which event any and all janitorial and cleaning services shall not be considered in computing Tenant's share of the cost of services and utilities.

In no event shall Landlord include, as part of his costs for services and utilities, any expense or repairs to the building for which he is obligated to perform under the terms of this lease.

The parties hereto agree that at the commencement of this Lease, they will estimate the costs of utilities and services for the next twelve-month period. Tenant shall thereupon pay its pro rata share in twelve (12) equal monthly installments, beginning with the first month of the lease term. At the end of the first year, Landlord will submit a statement of the total actual costs incurred by Landlord for all utilities and services supplied to the building, together with the bills and other evidence of payment. Said statement shall include Tenant's pro rata share. If Tenant's actual share is more than the total estimated payments made by Tenant, then Tenant shall pay the difference to Landlord. Correspondingly, if Tenant's actual share is less than the total estimated payments, Tenant shall be reimbursed for the difference by Landlord. Tenant's actual pro rata share, as shown on the statement, shall be used by the parties in computing Tenant's share of the cost of utilities and services for the next twelve-month period. At the end of the second year of the lease term, Landlord shall submit a statement of

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the total actual costs incurred by Landlord for all utilities and services supplied to the building, with Tenant's pro rata share shown thereon. If Tenant's actual share is greater than the total estimated payments made by Tenant, then Tenant will pay the difference to Landlord, and, correspondingly, if Tenant's actual share is less than the total estimated payments, Tenant shall be reimbursed for the difference by Landlord. This procedure shall be followed by the parties during the remainder of the term of this Lease or its extended term or terms.

9. The building plans and specifications, elevations and detailed plans and specifications, and other items required for the construction of the building herein leased have been prepared by Landlord's architect. All plans, specifications, etc., were approved by International Business Machines Corporation prior to the start of construction. However, approval by International Business Machines Corporation shall mean non-technical approval of materials and equipment and other general arrangements. Such approval shall not be considered to mean approval of, for example, structural capacity, size of ducts and piping, adequacy of electrical wiring, compressor capacity, etc.

It shall remain Landlord's responsibility to insure that the structure and detail of mechanical systems meet the design and operational requirements of the "IBM Building Requirements and Specifications" and of the plans and specifications approved by International Business Machines Corporation.

10. Tenant agrees to comply with all the rules and regulations of the Board of Fire Underwriters, Officers or Boards of the City, County or State having jurisdiction over the leased premises, and with all applicable laws, ordinances, regulations and legal requirements as any of the foregoing pertain to the manner in which Tenant shall use the leased premises and to the conduct of Tenant's business. Landlord agrees to comply with all such rules,

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regulations and applicable laws, ordinances and legal requirements which affect the building or the premises or which require structural repairs or alterations, changes or additions to the premises, building or building equipment, or any part of either.

11. Tenant may place such temporary partitions, fixtures (including lighting fixtures), personal property, machinery, motors, and the like, in the leased premises and may make such improvements and alterations in the interior thereof as it may desire at its own expense. All such things shall remain the property of Tenant, and in case of damage or destruction thereto by fire or other causes, Tenant shall have the right to recover as its own loss from any insurance company with which it has insured the same, notwithstanding the fact that any of such things might or could be considered to be a part of the leased premises. Tenant may remove all or any of such things prior to or at the expiration of this Lease. It is agreed that only an express abandonment in writing shall affect Tenant's ownership of any such things, except that Tenant may abandon the same, in whole or in part, to Landlord at the end or other expiration of the term by vacating the premises without removing the same. In the event of the removal of such things or any of them Tenant shall not be required to remove pipes, wires and the like from the walls, ceilings or floors, provided that Tenant properly cuts, caps and disconnects such pipes and wires and seals them off, if necessary, in a safe and lawful manner.

12. Landlord shall have the right at all reasonable times during the term of this Lease to enter the leased premises for the purpose of examining or inspecting the same and of making such repairs or replacements therein as may be required by this Lease or as Landlord shall deem neces-

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sary; provided, however, that Landlord shall use all reasonable effort to disturb Tenant's use and occupancy as little as possible.

13. Tenant may assign this Lease or sublet all or any part of the premises at any time covered hereby with the prior written consent of Landlord, which consent will not be unreasonably withheld; provided, however, that Tenant may assign this Lease to any of its subsidiaries or affiliates without the written consent of the Landlord. In any event, Tenant shall remain responsible for the faithful performance of all of the covenants, terms and conditions hereof on Tenant's part to be performed.

14. In the event that the premises or the building shall be damaged by fire, the elements, casualty, war, insurrection, riot, public disorder or other similar cause or happening, Landlord shall at its own expense repair such damage and restore the premises and/or the building to their original condition with all due diligence; provided, however, that if Landlord shall fail to proceed with and complete such repairs with all due diligence and in any event within one hundred twenty (120) days. Tenant may at its option terminate this lease on sixty (60) days' notice of its intention so to do, or it may after affording Landlord's insurance adjustors opportunity to inspect the damage done, make such repairs for the account and at the expense of Landlord, and Landlord, upon receipt of a statement thereof from Tenant, will reimburse Tenant for all expenditures reasonably made by it in making such repairs, and in default of such reimbursement, Tenant may deduct the amount of such expenditures from the rent due or to come due hereunder. Tenant shall be entitled to an abatement of rent for the period during which the premises are rendered untenable or incapable of use for the purpose for which the same are at the time of such damage being used. If a part only of the premises is rendered untenable or incapable of such use, the rent

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shall be reduced in the proportion which the rentable floor area of said part of the premises bears to the rentable floor area of the entire premises. If the damage shall be so extensive as to constitute a total destruction of the building, this Lease and the term hereby created shall thereupon cease and expire. In the event that this Lease terminates or is terminated, rent shall be apportioned and paid in full to the date of such termination, and all prepaid rent shall forthwith be repaid by Landlord to Tenant.

15. Landlord shall maintain insurance, covering the building and premises in an amount equal to at least eighty per cent (80%) of replacement cost thereof exclusive of excavations and foundations, against loss or damage by fire and perils specified in the standard extended coverage endorsement; and in case of damage or destruction to the premises or building by fire or any of said perils, whether or not attributable to the negligence of Tenant or its agents, visitors, servants or employees, Paragraph 14 shall control and Tenant shall have no liability to Landlord, or its insurer or insurers.

16. If Tenant shall default in the performance of any of its obligations pursuant to this Lease, and if such default shall continue for thirty (30) days after written notice thereof by Landlord to Tenant (except that if Tenant cannot cure any such default within said thirty-day period, said period shall be extended for a reasonable additional period, provided that Tenant commences to cure such default within said thirty-day period and proceeds diligently thereafter to effect such cure), or if Tenant shall be adjudicated bankrupt or insolvent according to law, or shall make an assignment for the benefit of creditors, then and in any of said cases, Landlord may lawfully enter into and upon said premises or any part thereof in the name of the whole and repossess the same as of the former estate of Landlord, and expel Tenant and those claiming under Tenant, without being deemed guilty of any man-

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ner of trespass and without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant, and upon entry as aforesaid, this Lease shall terminate and Tenant covenants that in case of such termination, it will indemnify Landlord against all unavoidable loss of rent which Landlord may incur by reason of such termination during the residue of the term above specified.

17. If Tenant remains in the premises beyond the expiration date of this Lease, as it may have been extended or renewed, such holding over in itself shall not constitute a renewal or extension of this Lease, but in such event a tenancy from month to month shall arise, subject to payment of the same rent by Tenant each month as that payable on account of the last month of the demised term. However, in the event that either party desires to terminate the month-to-month tenancy, it shall give the other party thirty (30) days' prior written notice, whereupon this lease shall terminate without any further liability of one party against the other.

18. Tenant, on paying the said rent and performing the covenants of this Lease on its part to be performed, shall and may peaceably and quietly have, hold and enjoy the demised premises for the term aforesaid and any extension or renewal thereof.

19. In the event that the premises or any part thereof are taken in condemnation proceedings or by any right of Eminent Domain or for any public or quasi-public use or purpose, this Lease shall terminate and expire on the date that possession is taken by the condemnor, and the rent herein reserved shall be apportioned and paid in full to that date and all prepaid rent shall forthwith be repaid by Landlord to Tenant and neither party hereto shall be liable to the other for rent, damage or otherwise for or by reason of any matter or thing occurring thereafter;

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provided, however, that if a part only of the demised premises shall be so taken or condemned, and in Tenant's opinion, the remaining portion of the premises shall be adequate and suitable for use by it for business purpose, then, at Tenant's option to be exercised by written notice given to Landlord not later than forty-five (45) days after the date possession of the part so taken or condemned shall be taken by the condemnor, this Lease shall continue in full force and effect except that the rent herein reserved shall be diminished in the proposition that the floor area of the part taken or condemned shall bear to the total floor area of the premises immediately prior to such taking. In such case, Landlord shall at its own expense, as speedily as circumstances permit, repair such damage to the demised premises and the building as shall have been caused by such partial condemnation and taking; provided, however, that if Landlord shall fail promptly to proceed with and complete such repairs, Tenant may make such repairs, or so much thereof as shall be reasonably required thoroughly to protect the demised premises, to restore the same as nearly as may be to their former condition and to fit them for business purposes, for the account and at the expense of Landlord, and Landlord will, upon receipt of a statement of the cost of such repairs from Tenant, reimburse Tenant for all expenditures reasonably made by it in making the same and in default of such reimbursement Tenant may deduct the amount of such expenditures from the rent due or to come due hereunder. If Tenant shall exercise its option to continue this Lease, during the period of restoration and repairs, the rent shall be abated for the period and to the extent that the premises may be untenable or incapable of use by Tenant. If all or part of the premises are taken or condemned for a period less than the balance of the term of the Lease as it may be extended, then, at Tenant's option to be exercised not later than forty-five

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(45) days after the date possession shall be taken by the condemnor, this Lease shall continue in full force and effect.

However, nothing herein contained shall be deemed to prevent Tenant, at its own cost and expense, from participating in any proceedings commenced against Landlord, for the condemnation of all or a part of the building of which the demised premises form a part. Tenant shall have the right to participate proportionately with Landlord in any award made in such condemnation proceedings, to the extent that any expenditures by Tenant may have resulted in capital improvement to the building, and as the same may be reflected in any such award.

20. In every case, when under the provisions of this Lease it shall be necessary or desirable for Tenant to serve any notice or demand on Landlord, such notice or demand shall be served personally or by registered mail addressed to Landlord at its address listed in page 1 hereof, until otherwise directed in writing by Landlord; and any such notice or demand to be given to Tenant, shall be served personally, or by registered mail addressed to Tenant's Administration Manager at the leased premises; and copies of such notice shall be served simultaneously by registered mail on Tenant, attention of The Field Real Estate Department, 112 East Post Road, White Plains, New York, and attention of the Real Estate Administrator, 425 Park Avenue, New York 22, New York.

21. Tenant shall have the privilege of placing on the premises or attaching to the exterior of the building its standard IBM sign. No other signs may be maintained in or on the premises or building, nor shall any tenant display any signs on the exterior windows or exterior doors without prior approval of IBM. However, Landlord may provide a directory for other tenants' names in the lobby of said building for the use of tenants other than IBM.

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22. Landlord shall pay, on or before the last day on which they may be paid without penalty or interest, all real estate taxes, easements, and other governmental charges which shall be levied or assessed or which become liens upon the leased premises during the lease term. It is hereby agreed that, upon ten (10) days' written notice to Landlord, Tenant may pay delinquent taxes, assessments or other charges affecting the premises, and make payments pursuant to, or cure any defaults in, the terms of any mortgage, security deed, or deed of trust affecting the demised premises which is prior in lien or effect or paramount to this Lease; and upon such written notice Tenant may pay and discharge, in installments or otherwise, any other charges, liens or encumbrances which may jeopardize Tenant's right of possession or interest pursuant to this Lease; and in such event, Tenant may set off any such payment against the rent due or to become due under this Lease; and/or Tenant, upon written notice to Landlord, may demand reimbursement therefor, or part thereof, from Landlord; and Landlord covenants to promptly reimburse Tenant after such notice and demand.

23. Tenant is hereby granted the option, at the end of the fourth year of the term of this Lease, upon one hundred twenty (120) days' prior notice to Landlord, to lease one-half (1/2) of the second floor, in the rear area of said floor, said area to contain approximately 3,766 square feet of rentable space, at an annual rental of \$8,225.00, and under the same terms and conditions and for the unexpired period of the original Lease or any of its extended terms thereof. In the event that the optioned space is more or less than 3,766 square feet of rentable space, then the rental shall be pro rated in the same proportion that the actual rentable space to be optioned bears to 3,766 square feet.

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24. If Tenant exercises the option granted in Paragraph 23, in addition to the rent specified in said paragraph, Tenant also agrees to reimburse Landlord each year, beginning with the fifth year of the lease and through the ninth year of the initial term, a pro rata share of the amount by which the annual real estate taxes paid in the fifth year exceeds the real estate taxes paid by the Landlord during the first full tax year occurring after the first full assessment of the building and improvements as a fully-completed and occupied building. Tenant's pro rata share shall equal the percentage of such increase of taxes which the rentable square-foot area of the option space bears to the rentable square feet of the building, stipulated in Paragraph 8 above as 15,064 square feet. Said increase in real estate taxes, if any, shall apply only to the option space on the second floor and in no event shall include the first floor area. Only such taxes properly allocable to said property as if a single tax lot shall be taken into account. If the real estate taxes for the building and improvements paid in the fifth year of the initial term exceed the real estate taxes paid in the first full tax year as described above, Landlord shall submit to Tenant the original paid tax bill for said fifth year, or a photostat thereof, whereupon Tenant shall pay the difference between the fifth year tax bill and the tax bill paid by the Landlord for the first full tax year. Thereafter, during the sixth through the ninth year of the initial term, Tenant shall pay a similar sum to the Landlord. However, Tenant shall have the right to pro rate this sum, during each year of the balance of the initial term, in equal monthly installments and include same with the fixed monthly rental.

25. In the event that Tenant, at the termination of the initial lease, exercises the option to extend this Lease as hereinafter stated, then Tenant shall have the further

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option, upon one hundred twenty (120) days' prior written notice to Landlord, to lease the balance of the second floor. The annual rental to be paid for this additional option space shall be the difference between \$16,450, the rental for the entire second floor, and the amount paid by Tenant for that portion of the second floor upon election of the first option for additional space. Said additional space shall be under the same terms and conditions as the initial term of this Lease, or any of the extended terms hereof.

26. Failure of Tenant to exercise the option granted in Paragraph 23 above shall not preclude Tenant from leasing one-half (1/2) of the second floor at the termination of the initial Lease. Landlord agrees that if Tenant extends this Lease for the first five (5) years, as hereinafter stated in Paragraph 29, Tenant shall have the option to lease one-half (1/2) of the second floor, upon the same rental, terms and conditions given in Paragraph 23 above. Tenant shall give Landlord one hundred twenty (120) days' prior written notice, which notice may be incorporated in the notice to extend.

27. Landlord further agrees that if Tenant has exercised the option to lease one-half (1/2) of the second floor, for the first 5-year extended term in accordance with Paragraph 26 above, then Tenant shall have the further option to lease the balance of the second floor for the second five-year extended term, provided Tenant gives Landlord one hundred twenty (120) days' prior written notice, which notice may be incorporated in the notice to extend.

The annual rental for the balance of the second floor shall be computed in the same manner as shown in Paragraph 25 above, and said additional space shall be subject to the same terms and conditions of this Lease or any extended terms hereof.

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28. Landlord further agrees that if Tenant has not exercised its option granted in Paragraph 26 above, Tenant, nevertheless, shall have the right to lease one-half (1/2) of the second floor at the termination of the first five-year extended term, provided Tenant extends this Lease for the additional five-year term granted in Paragraph 29 below, and further provided that Tenant gives Landlord one hundred twenty (120) days' prior written notice, which notice may be incorporated in the notice to extend. The annual rental for one-half (1/2) of the second floor shall be computed in the same manner as provided in Paragraph 23 above, and said space shall be subject to the same terms and conditions of this Lease or any of the extended terms hereof.

It is understood and agreed that Landlord will remove any and all partitions, as directed by Tenant, from any of the additional spaces at the time said Tenant exercises all or any of the options mentioned above.

29. Tenant may, at its option, extend the term of this Lease for a further term of five (5) years, upon the same terms and conditions, by giving written notice to Landlord of its intention to extend at least one hundred twenty (120) days prior to the end of the term, and thereupon the term of this Lease shall be so extended without any further action by either party.

If the term of this Lease is extended as aforesaid, Tenant may, at its option, extend the term of this Lease for a second further term of five (5) years, upon the same terms and conditions, by giving written notice to Landlord of its intention to extend at least one hundred twenty (120) days prior to the end of the first extended term; and thereupon, the term of this Lease shall be so extended without any further action by either party.

Said option to extend the term of this lease shall be effective as to all premises covered by this lease at the

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time or times of the exercise thereof, and as to any other premises in the building or on adjoining premises which may at such time or times be under lease to Tenant.

30. Tenant further agrees that if it exercises the first option to extend this lease, as hereinabove mentioned in Paragraph 29, said Tenant shall reimburse Landlord each year, beginning with the first year and continuing through the fifth year of the first extended term, for its pro rata share of the amount by which the annual real estate taxes paid by the Landlord in the first year of the first extended term exceeds the real estate taxes paid by Landlord during the first full tax year occurring after the first full assessment of the building and improvements as a fully-completed and occupied building. If the real estate taxes for the building and improvements paid in the first year of the extended term exceed the real estate taxes paid in the first full tax year as described in Paragraph 24, Landlord shall submit to Tenant the original paid tax bill for said first year of the first extended term, or a photostat thereof, whereupon Tenant shall pay the difference between the tax bill for the first extended year and the tax bill paid by Landlord during the first full tax year. Thereafter, during the second through the fifth year of the first extended term, Tenant shall pay a similar sum to the Landlord. However, Tenant shall have the right to pro rate this sum, during each year of the balance of the first extended term, in equal monthly installments and include same with the fixed monthly rent.

31. Tenant further agrees that if it exercises the second option to extend this Lease, as hereinabove mentioned in Paragraph 29, said Tenant shall reimburse Landlord each year, beginning with the first year and continuing through the fifth year of the second extended

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term, for its pro rata share of the amount by which the annual real estate taxes paid by Landlord during the first year of the second extended term exceeds the real estate taxes paid by Landlord during the first full tax year occurring after the first full assessment of the building and improvements as a fully-completed and occupied building. If the real estate taxes for the building and improvements paid in the first year of the second extended term exceed the real estate taxes paid in the first full tax year as described in Paragraph 24, Landlord shall submit to Tenant the original paid tax bill for said first year of the second extended term, or a photostat thereof, whereupon Tenant shall pay the difference between the tax bill for the first extended year and the tax bill paid by Landlord during the first full tax year. Thereafter, during the second through the fifth year of the second extended term, Tenant shall pay a similar sum to the Landlord. However, Tenant shall have the right to pro rate this sum, during each year of the balance of the second extended term, in equal monthly installments and include the same with the fixed monthly rent.

Tenant's pro rata share, in each case, shall equal the percentage of such increase of taxes which the total area then occupied by Tenant bears to the total rentable area of the building.

32. Landlord covenants and agrees that during the term of this Lease, and any renewal or extension thereof, it will provide and maintain a parking area immediately adjacent to the leased premises, with means of access at all times for each car as can be physically accommodated and as shown on the plans and specifications heretofore approved by Landlord and Tenant. Landlord agrees to suitably pave and keep said parking area properly drained, and to have each space clearly marked off with

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appropriate lines. At the commencement of this Lease, fifty per cent (50%) of the parking spaces shall be marked off and assigned for Tenant's exclusive use, at no cost to said Tenant. In the event that Tenant acquires additional space in the building, Tenant shall be entitled at no cost to Tenant, to a pro rata share of the balance of the parking spaces, said spaces to be properly designated for Tenant's exclusive use.

The Landlord covenants and agrees that the building presently standing on part of the area shown in the approved plans and specifications to be used as a parking lot will be removed by Landlord, at Landlord's sole cost and expense, by no later than December 31, 1963. Landlord, nevertheless, shall mark and designate for Tenant's exclusive use as many of the parking spaces then available until the removal of the building as shall equal the number of spaces to which Tenant is entitled under this agreement. If the number of spaces then available shall be less than the amount required for Tenant's use under this agreement, then Landlord will secure additional parking for Tenant's use at Landlord's sole cost and expense, within a reasonable distance from the premises. Promptly upon removal of the building, Landlord agrees to grade and pave the razed area and thereafter maintain the entire area as a parking lot, with all spaces clearly marked off with appropriate lines, as provided in this agreement.

33. Landlord covenants and agrees that during the term of this Lease, and any renewal or extension thereof, it will not sell or lease any part of such building or any adjoining property which Landlord may own or control to any person, firm or corporation manufacturing, selling, dealing or trading in products or offering service similar to, or for like purposes, as the products and services offered by the Tenant, such as accounting, punched card,

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tabulating and data processing machines, equipment, systems and devices, office equipment, typewriters, and supplies for such machines, equipment, systems or devices, or any of them, and services therefor.

34. It is understood that Landlord will lease the second floor to tenants other than IBM, subject to the provisions of Paragraphs 23, 25, 26, 27, 28 and 29 of this Lease. However, Tenant shall have the right of prior approval of such leasing to other Tenants by Landlord, which approval will not be unreasonably withheld.

35. This Lease shall not be binding and in effect until a counterpart hereof has been executed and delivered by the parties each to the other. This Lease contains the entire agreement of the parties and may not be modified except by instrument in writing.

36. This Lease shall bind and inure to the benefit of the parties hereto and their respective heirs, representatives, successors or assigns (provided that this Lease shall not inure to the benefit of any assignee pursuant to an assignment which is not in compliance with the terms of this Lease).

IN WITNESS WHEREOF, this instrument has been duly executed by the parties hereto as of the day and year first above written.

J. ROBERT BALDWIN
ARTHUR W. BALDWIN
Landlord

INTERNATIONAL BUSINESS
MACHINES CORPORATION
By (Illegible)
Divisional Controller
Tenant

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EXHIBIT "A"

DISPOSAL PARCEL GC-11D

WARD 16, BLOCK 7

DESCRIPTION

Beginning at a point in the northeasterly side of Lot 30 in Assessment Block 7, Ward 16, said point being located N50°00' W-95.00 feet from the northwesterly side of Wyoming Avenue and the easterly corner of Lot 30; thence, along the northeasterly side of Lot 30, N50°00' W-32.00 feet to a point in the southeasterly side of Oakford Court, said point being the westerly corner of a present two story brick building and the westerly corner of Lot 29 in Block 7, Ward 16; thence, along the southeasterly side of Oakford Court, N40°16' E-81.15 feet to a point in the northerly corner of said present two story brick building, thence, crossing Lots 24, 25A and 25B, S50°00' E-82.00 feet to a point in Lot 27; thence, through Lots 27, 28 and 29, S40°16' W-81.15 feet to the place of beginning. Containing 6,654 sq. ft. of land and being composed of parts of Lots 24, 25A, 25B, 26, 27, 28 and 29 in Assessment Block 7, Ward 16 in the City of Scranton, County of Lackawanna and State of Pennsylvania.

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EXHIBIT "B"

DISPOSAL PARCEL GC-11A

WARD 16, BLOCK 7

DESCRIPTION

Beginning at an iron pin in the northwesterly side of Wyoming Avenue at the easterly corner of Lot 30 and the southerly corner of Lot 29; thence, along the dividing line of Lot 30 and Lot 29, N50°00' W-95.00 feet to a point; thence, across Lots 29 and 28, N40°16' E-81.15 feet to a point in Lot 27, thence, through Lots 27, 25B, 25A and 24 N50°00' W-82.00 feet to a point in the southeasterly side of Oakford Court and the northerly corner of a present two story brick building; thence, along the southeasterly side of Oakford Court, N40°16' E-57.65 feet to a point in the new widened right of way line of Mulberry Street, also known as Legislative Route 35072 of the Pennsylvania Department of Highways; thence, along a curve to the left, said curve having a radius of 7,689.49 feet and 50.00 feet southwest of the new center line of Mulberry Street; thence, along a chord to said curve, S52°59' E-142.30 feet to a point, said point being the beginning of curvature of an Arc to the right, said Arc having a radius of 35.70 feet; thence, along said Arc to the right a distance of 55.60 feet to a point in the northwestern side of Wyoming Avenue; thence along the northwesterly side of Wyoming Avenue S40°16' W-110.30 feet to the place of beginning. Containing 18,712 sq. ft. of land, more or less, and being composed of parts of Lots 28 and 29, also parts of Lots 24, 25A, 25B, 26 and 27 in Assessment Block 7, Ward 16 in the City of Scranton, County of Lackawanna, and State of Pennsylvania.

**Exhibit V, Annexed to Affidavit of Thomas F. Daly—
Lease, Dated September, 1962.**

LEASE

THIS LEASE made as of the day of September, 1962, between CHRISTIAN OLESEN, Jr., having a place of business at 49 Dartmouth Street, Portland, Maine, hereinafter called the "Landlord", and INTERNATIONAL BUSINESS MACHINES CORPORATION, a New York corporation having its principal office at 590 Madison Avenue, County, City and State of New York, hereinafter called the "Tenant", or "IBM".

WITNESSETH, that the Landlord hereby leases to the Tenant, and the Tenant hereby hires and takes from the Landlord the following described premises:

All that tract or parcel of land located at 555 *Forest Avenue*, in the City of *Portland*, County of *Cumberland* and State of *Maine*, being the same premises conveyed to the Landlord herein by the Warranty Deed of Alton B. Warren, dated May 22, 1961, and recorded in the Cumberland County Registry of Deeds, to which Registry reference is hereby made for a more particular description.

together with the building and improvements thereon to be completed in accordance with building plans and specifications made by Carl J. Petrilli, registered architect, dated November 1, 1961, as approved, when applicable, with IBM Branch Office Building Specifications attached hereto.

This Lease is granted and accepted upon the following terms, covenants and conditions:

1. The Leased premises shall be used and occupied by the Tenant for general office use; sales and display purposes; engineering services; and repair of Tenant's prod-

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ucts and equipment; and all other purposes incidental and related thereto, and for other lawful business and commercial purposes.

2. The Landlord shall construct on this property an air conditioned, two-story building having a gross area of approximately 10,100 square feet. Gross area means square foot area determined by a measurement of the exterior of the building and will include exterior building walls. The entire building and improvements shall be constructed and equipped in accordance with preliminary plans and elevations which have been provided by the Tenant and in accordance with the attached "IBM Branch Office Building Specifications". The Landlord agrees to employ the licensed architect selected by the Tenant who shall prepare, in accordance with said preliminary plans, elevations and specifications, detailed final specifications, plans and construction drawings for the building and improvements, all of which have been approved by Tenant prior to commencement of construction. When the final specifications, plans and construction drawings have been completed and approved by Tenant, no changes thereto shall be permitted unless directed in writing by the Tenant. Loading facilities, including a levelator, shall be provided by Landlord where designated by Tenant on said preliminary plans, as well as sidewalks and appropriate landscaping.

3. The lease term shall be for a period of ten (10) years, said term to commence fifteen (15) days after the building is completed (in accordance with said final specifications, plans and construction drawings), as certified to by Landlord's architect, and accepted by Tenant, which acceptance will not be unreasonably withheld or delayed. Approval by IBM shall mean non-technical approval of materials and equipment and other general arrangements. Such approval shall not be considered to mean approval of, for example, structural capacity, size of ducts and piping,

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adequacy of electrical wiring, compressor capacity, etc. It shall remain the Landlord's responsibility to insure that the structure and detail of mechanical systems meet the design and operational requirements of the "IBM Branch Office Building Specifications" and of the plans and specifications approved by IBM. However, if the Tenant shall occupy the building at any time during the fifteen (15) days after the Tenant has accepted the building, rental shall commence from the date of occupancy by the Tenant. Rent for any period of less than one month shall equal 1/30th of the monthly rent for each day of such period. Landlord must construct the building as rapidly as possible after Tenant has approved the final specifications, plans and construction drawings. It is the intention of the parties that the building will be ready for occupancy on or before December 1, 1962, and the Landlord must use his best efforts to complete it by that date.

4. The rental shall be an annual amount, payable in twelve (12) equal monthly installments on the first day of each calendar month during the term, in advance, in accordance with the following formula:

A. The basic annual rental rate for the entire premises shall be \$2.50 per gross square foot, but said square footage shall be measured by the square foot area of the building above ground. This rate is predicated upon a construction cost of the entire premises above ground at \$18.00 per square foot. For the purpose of this agreement, any reference in this Paragraph 4 to "Cost of Construction" shall be understood to mean pure construction costs of the building only and shall not include the costs for site preparation, demolition, paving, taxes, interim financing, landscaping, a pedestal retaining wall fronting on Forest Avenue and Belmont Street, and any payments for materials and labor incidental to zoning. These costs are to be borne solely by the Landlord and are included in the basic rental rate of \$2.50 per square foot.

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B. The Landlord and Tenant agree that the building area above ground has a total gross area of 10,106 square feet. Therefore, the basic annual rent shall be \$2.50 multiplied by 10,106, or \$25,265.00, and the total basic cost of construction of the building above ground shall be 10,106 multiplied by \$18.00, or \$181,908.00. If the utilities and/or storage necessitate a basement area, the cost for same must be included in the rate of \$13.00 per square foot.

C. If the cost of construction of the building above ground shall exceed \$181,908, then the basic annual rental shall be increased as follows:

1. Assuming Landlord obtains a mortgage at 5% interest per annum, the increase shall be derived by multiplying the cost of said construction in excess of \$181,908 by 9-1/4%.

2. Assuming Landlord obtains a mortgage at any other rate per annum but not exceeding the then prevailing mortgage rate in the Portland, Maine, commercial area, the increase shall be derived by multiplying the cost of said construction in excess of \$181,908 by a percentage which bears a similar mathematical progression as 5 is to 9-1/4 and 5-1/2 is to 9-3/4, or mathematical regression as 5 is to 9-1/4 and 4-1/2 is to 8-3/4.

3. Assuming Landlord does not obtain a mortgage, for purposes of the above computation, it will be conclusively presumed that Landlord obtained a mortgage at the then going rate in Portland, Maine, commercial area.

D. Tenant further agrees to pay the sum of \$450.00 per annum, as additional rent. Said rent is to reimburse Landlord for the increased cost of the land over and above the original agreed amount.

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E. The storage area in the basement, including the shelter, shall be for the exclusive use of the Tenant. However, the shelter is in the process of being constructed at the request of Tenant and has not been included in the original agreement between the parties. It is therefore understood and agreed by and between the Landlord and the Tenant that the cost of the shelter, which has been fixed in the sum of \$6500.00, shall be the obligation of the Tenant and shall be repaid by the Tenant to the Landlord upon the final determination of the total cost of construction of the premises. At no time shall the cost of the shelter be computed as part of the total cost of construction in arriving at the annual rental during the term of this lease or any extended term hereof.

F. Within a reasonable time after the building has been completed as certified by the Landlord's architect and possession has been accepted by the Tenant, and after the total cost of construction has been determined, the Landlord and the Tenant shall execute a Supplemental Agreement which shall state the following:

1. The commencement and termination dates of this Lease;
2. The total annual rental to be paid to the Landlord by the Tenant during the term of this Lease;
3. The commencement and termination dates of the Sublease between the Tenant and the Landlord;
4. The total annual rental to be paid by the Landlord to the Tenant during the term of this Sublease;
5. That all the terms, covenants and conditions herein contained are ratified by both the Landlord and the Tenant and that all of said terms, covenants and conditions are in full force and effect.

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5. The Tenant will pay said rent without deduction or demand to Christian Olesen, Jr. at 49 Dartmouth Street, Portland, Maine, or to such other person or at such other place as the Landlord may designate in writing.

6. The Landlord covenants as a condition of this lease that it has good marketable title to the premises and right to make this lease for the term aforesaid; that it will put the premises and all building equipment (including, without limitation, all plumbing, electrical, heating and air conditioning equipment) in good repair and condition at the commencement of the term; that it will deliver possession of the premises to the Tenant at the commencement of the term; and that the premises are fit and may lawfully be used by the Tenant for the uses hereinabove expressed.

7. The Landlord covenants as a condition of this lease, that the premises will be furnished with an adequate water supply and all necessary air conditioning, eating, lighting, and plumbing fixtures and equipment. The Landlord will furnish all necessary electric light and power service lines, including proper wiring in the leased premises.

8. The Tenant shall keep the premises in as good order and condition and repair as when delivered to it, excepting ordinary wear and tear, damage by fire, the elements and casualty, and the Landlord's negligence. The Tenant shall be responsible for ordinary interior repairs to the leased premises and for minor repairs to and normal maintenance of the building equipment serving the leased premises. The Tenant shall enter into the usual form of service contracts to insure proper operation of the heating and air conditioning equipment serving the leased premises.

The Landlord shall be responsible for "major repairs" to and replacement of building equipment such as heating, air conditioning, plumbing, mechanical and electrical and similar fixtures, appurtenances and equipment where such

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repairs and replacements are necessary because of defective material, faulty installation and normal wear, tear and decay, or by fire and other casualty. "Major repairs and replacements" shall include any single repair or single replacement which costs in excess of Five Hundred Dollars (\$500.00). The Landlord shall keep in repair the roof and exterior of the building and shall be responsible for exterior building repairs and maintenance including, without limitation, the foundation, walls, floors, ceilings, driveways and sidewalks, parking area and grounds, and for repairs and replacements made necessary by structural failures and defects, except where such repairs and replacements are required because of Tenant's negligence.

In the event that the Landlord fails to make any repairs or replacements which it is required to make hereunder within a reasonable time specified in a written notice by the Tenant, then in that event the Tenant may make such repairs and deduct the cost thereof from the rent due or to accrue hereunder.

The Tenant will repair all damage or injury to the premises, fixtures, appurtenances and equipment, or to the building caused by the Tenant's installation or removal of furniture, fixtures or other property or resulting from the negligence or tortious conduct of the Tenant, its servants, employees, agents or visitors.

9. The Tenant agrees to comply with all the rules and regulations of the Board of Fire Underwriters, Officers or Boards of the City, County or State having jurisdiction over the leased premises, and with all applicable laws, ordinances, regulations and legal requirements as any of the foregoing pertain to the manner in which the Tenant shall use the leased premises and to the conduct of the Tenant's business. The Landlord agrees to comply with all such rules, regulations, and applicable laws, ordinances, and legal requirements which affect the building or the premises or which require structural repairs or altera-

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tions, changes or additions to the premises, building or building equipment, or any part of either.

10. The Tenant may place such temporary partitions, fixtures (including lighting fixtures), personal property, machinery, motors, and the like, in the leased premises and may make such improvements and alterations in the interior thereof as it may desire at its own expense. All such things shall remain the property of the Tenant, and in case of damage or destruction thereto by fire or other causes, the Tenant shall have the right to recover as its own loss from any insurance company with which it has insured the same, notwithstanding the fact that any of such things might or could be considered to be a part of the leased premises. The Tenant may remove all or any of such things prior to or at the expiration of this lease. It is agreed that only an express abandonment in writing shall affect the Tenant's ownership of any such things, except that the Tenant may abandon the same, in whole or in part, to the Landlord at the end or other expiration of the term by vacating the premises without removing the same. In the event of the removal of such things or any of them, the Tenant shall not be required to remove pipes, wires and the like from the walls, ceilings or floors, provided that the Tenant properly cuts, caps and disconnects such pipes and wires and seals them off, if necessary, in a safe and lawful manner.

11. The Landlord shall have the right at all reasonable times during the term of this lease to enter the leased premises for the purpose of examining or inspecting the same and of making such repairs or replacements therein as may be required by this lease or as the Landlord shall deem necessary; provided, however, that the Landlord shall use all reasonable effort not to disturb the Tenant's use and occupancy.

Exhibit V, Annexed to Affidavit of Thomas F. Daly

12. The Tenant may assign this lease or sublet all or any part of the premises at any time covered hereby without consent of the Landlord. However, the Tenant will advise the Landlord of any such changes. In any event, the Tenant shall remain responsible for the faithful performance of all of the covenants, terms and conditions hereof on the Tenant's part to be performed.

13. In the event that the premises or the building shall be damaged by fire, the elements, casualty, war, insurrection, riot, public disorder or any cause or happening, the Landlord shall at its own expense repair such damage and restore the premises and/or the building to their original condition with all due diligence; provided, however, that if the Landlord shall fail to proceed with and complete such repairs with all due diligence and in any event within 120 days, the Tenant may at its option terminate this lease on 5 days notice of its intention so to do, or it may after affording the Landlord's insurance adjustors opportunity to inspect the damage done, make such repairs for the account and at the expense of the Landlord, and the Landlord upon receipt of a statement thereof from the Tenant, will reimburse the Tenant for all expenditures reasonably made by it in making such repairs, and in default of such reimbursement, the Tenant may deduct the amount of such expenditures from the rent due or to come due hereunder. The Tenant shall be entitled to an abatement of rent for the period during which the premises are rendered untenable or incapable of use for the purpose for which the same are at the time of such damage being used. If a part only of the premises is rendered untenable or incapable of such use, the rent shall be reduced in the proportion which the floor area of said part of the premises bears to the floor area of the entire premises. If the damage shall be so extensive as to constitute a total or substantial destruction of the building so that it cannot be reconstructed in

Exhibit V, Annexed to Affidavit of Thomas F. Daly

the time allotted above, this lease and the term hereby created shall thereupon cease and expire. In the event that this lease terminates or is terminated, rent shall be apportioned and paid in full to the date of such termination, and all prepaid rent shall forthwith be repaid by the Landlord to the Tenant.

The Landlord shall maintain insurance, covering the building and premises in an amount equal to at least 80 per cent of replacement cost thereof exclusive of excavations and foundations, against loss or damage by fire and the perils specified in the standard extended coverage endorsement; and in case of damage or destruction to the premises or building by fire or any of said perils, whether or not attributable to the negligence of the Tenant or its agents, visitors, servants or employees, this Paragraph 13 shall control and the Tenant shall have no liability to the Landlord or its insurer or insurers.

14. If the Tenant shall default in the performance of any of its obligations pursuant to this lease and if such default shall continue for thirty (30) days after written notice thereof by the Landlord to the Tenant, (except that if the Tenant cannot cure any such default within said thirty-day period, said period shall be extended for a reasonable additional period, provided that the Tenant commences to cure such default within said thirty-day period and proceeds diligently thereafter to effect such cure) or if the Tenant shall be adjudicated bankrupt or insolvent according to law, or shall make an assignment for the benefit of creditors, then and in any of said cases, the Landlord may lawfully enter into and upon said premises or any part thereof in the name of the whole, and repossess the same as of the former estate of the Landlord and expel the Tenant and those claiming under the Tenant without being deemed guilty of any manner of trespass and without prejudice to any remedies which might otherwise be used for arrears of rent or preceding

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breach of covenant, and upon entry as aforesaid, this lease shall terminate and the Tenant covenants that in case of such termination, it will indemnify the Landlord against all unavoidable loss of rent which the Landlord may incur by reason of such termination during the residue of the term above specified.

15. If the Tenant remains in the premises beyond the expiration date of this lease, as it may have been extended or renewed, such holding over in itself shall not constitute a renewal or extension of this lease, but in such event a tenancy from month-to-month shall arise, subject to payment of the same rent by the Tenant each month as that payable on account of the last month of the demised term.

16. The Tenant, on paying the said rent and performing the covenants of this lease on its part to be performed, shall and may peaceably and quietly have, hold and enjoy the demised premises for the term aforesaid and any extension or renewal thereof.

17. The Tenant may, at its option, extend the term of this lease for a further term of five years upon the same terms and conditions, by giving written notice to the Landlord, in the manner herein provided, of its intention to extend at least six months prior to the end of the term, and thereupon the term of this lease shall be so extended without any further action by either party.

If the term of this lease is extended as aforesaid, the Tenant may, at its option, extend the term of this lease for a second further term of five years upon the same terms and conditions, except that the rental per annum shall be reduced by 30 per cent, by giving written notice to the Landlord, in the manner herein provided, of its intention to extend at least six months prior to the end

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of the first extended term, and thereupon the term of this lease shall be so extended without any further action by either party. Said options to extend the term of this lease shall be effective as to all premises covered by this lease at the time or times of the exercise thereof, and as to any other premises in the building or on adjoining premises which may at such time or times be under lease to the Tenant.

18. In the event that the premises or any part thereof, which would substantially deprive Tenant of the beneficial use of the premises, shall be taken in condemnation proceedings or by any right of eminent domain or for any public or quasi public use or purpose, this lease shall terminate and expire on the date that possession is taken by the condemnor, and the rent herein reserved shall be apportioned and paid in full to that date and all prepaid rent shall forthwith be repaid by the Landlord to the Tenant and neither party hereto shall be liable to the other for rent, damage or otherwise for or by reason of any matter or thing occurring thereafter; provided, however, that if a part only of the demised premises shall be so taken or condemned and, the remaining portion of the premises shall be adequate and suitable for use by Tenant for business purposes, then, at the Tenant's option to be exercised by written notice given to the Landlord not later than 45 days after the date possession of the part so taken or condemned shall be taken by the condemnor, this lease shall continue in full force and effect except that the rent herein reserved shall be diminished in the proportion that the floor area of the part taken or condemned shall bear to the total floor area of the premises immediately prior to such taking. The parties agree that taking of sufficient space so as to reduce the amount of space to less than 100 square feet per person assigned

Exhibit V, Annexed to Affidavit of Thomas F. Daly

to the office or so as to make the remaining portion of the premises unsuitable for use by the Tenant for its business purposes will constitute a substantial deprivation of the beneficial use of the premises. Landlord shall at its own expense, as speedily as circumstances permit, repair such damage to the demised premises and the building as shall have been caused by such insubstantial condemnation and taking; provided, however, that if the Landlord shall fail promptly to proceed with and complete such repairs, the Tenant may make such repairs, or so much thereof as shall be reasonably required thoroughly to protect the demised premises, to restore the same as nearly as may be to their former condition and to fit them for business purposes, for the account and at the expense of the Landlord, and the Landlord will, upon receipt of a statement of the cost of such repairs from the Tenant, reimburse the Tenant for all expenditures reasonably made by it in making the same and in default of such reimbursement the Tenant may deduct the amount of such expenditures from the rent due or to come due hereunder. If the Tenant shall exercise its option to continue this lease, during the period of restoration and repairs, the rent shall be abated for the period and to the extent that the premises may be untenable or incapable of use by the Tenant. If all or any part of the premises are taken or condemned for a period less than the balance of the term of the lease, or as it may be extended, then, at the Tenant's option, to be exercised not later than forty-five (45) days after the date possession shall be taken by the Condemnor, this lease shall continue in full force and effect with a total or prorata abatement of rent and with Landlord being responsible to restore the premises to their condition prior to the taking before redelivery to Tenant.

However, nothing herein contained shall be deemed to prevent the Tenant, at its own cost and expense, from

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participating in any proceedings commenced against the Landlord, for the condemnation of all or a part of the building of which the demised premises form a part. The Tenant shall have the right to participate proportionately with the Landlord in any award made in such condemnation proceedings, to the extent that any expenditures by the Tenant may have resulted in capital improvement to the building, and as the same may be reflected in any such award.

19. In every case, when under the provisions of this lease it shall be necessary or desirable for the Tenant to serve any notice or demand on the Landlord, such notice or demand shall be served personally or by registered mail addressed to the Landlord at its address listed in Page 1 hereof, until otherwise directed in writing by the Landlord, and any such notice or demand to be given to the Tenant, shall be served personally, or by registered mail addressed to the Tenant's Administration Manager at the leased premises and copies of such notice shall be served simultaneously by registered mail on the Tenant, attention of the Field Real Estate Department, 112 East Post Road, White Plains, New York, and attention of the Real Estate Administrator, 425 Park Avenue, New York 22, New York, until otherwise directed in writing by the Tenant.

20. The Tenant shall have the privilege of placing on the premises or attaching to the exterior of the building its standard IBM sign. No other signs may be maintained in or on the premises or building.

21. The Landlord agrees to provide and maintain for the sole use and benefit of the Tenant a suitable paved and drained parking area on the leased premises as

Exhibit V, Annexed to Affidavit of Thomas F. Daly

shown on the approved plans. Parking must be available for at least 26 cars, with means of access for each car at all times.

22. The Landlord shall pay on or before the last day on which they may be paid without penalty or interest all real estate taxes, assessments, and other governmental charges which shall be levied or assessed or which become liens upon the leased premises during the lease term. It is hereby agreed that, upon ten (10) days written notice to the Landlord, Tenant may pay delinquent taxes, assessments or other charges affecting the premises, and make payments pursuant to, or cure any defaults in, the terms of any mortgage, security deed, or deed of trust, affecting the demised premises, which is prior in lien or effect or paramount to this lease, and upon such written notice the Tenant may pay and discharge, in installments or otherwise, any other charges, liens or encumbrances which may jeopardize the Tenant's right of possession or interest pursuant to this lease; and in such event the Tenant may set off any such payment against the rent due or to become due under this lease and/or the Tenant, upon written notice to the Landlord, may demand reimbursement therefor, or part thereof, from the Landlord, and the Landlord covenants to promptly reimburse the Tenant after such notice and demand.

23. Landlord shall pay real estate taxes, easements and other charges levied against the leased premises. If the real estate taxes on the leased premises for any tax year during the term of this lease or any extension thereof are in excess of the real estate taxes paid during the first full tax year occurring after the first full assessment of the building as a fully-completed building, then Tenant

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shall pay Landlord as additional rent during the term of this lease and its extended term such tax increase which is properly allocable to the leased premises. Landlord shall reimburse Tenant annually for Tenant's pro rata share of any decrease in real estate taxes. The Landlord agrees that it will contest any assessment made against the building at the request of the Tenant and at the Tenant's expense.

24. The Landlord covenants and agrees that during the term of this lease and any renewal or extension thereof, it will not sell or lease any part of such building or any adjoining property which the Landlord may own or control to any person, firm or corporation manufacturing, selling, dealing or trading in products or offering service similar to or for like purposes as the products and service offered by the Tenant, such as accounting, punched card, tabulating and data processing machines, equipment, systems and devices, office equipment, typewriters, and supplies for such machines, equipment, systems or devices or any of them, and service therefor.

25. Tenant agrees to pay for all utilities which it consumes at the leased premises.

26. Landlord agrees to sublease from IBM the second floor of the demised premises, containing an area of approximately 5053 gross square feet, for a term of five (5) years; the beginning of said term to coincide with the commencement date of the within lease.

The annual rental to be paid by the Landlord to the Tenant for the subleased area during the sublease term shall be fifty (50%) per cent of the annual rental paid by the Tenant to the Landlord for the entire premises, said annual rental to be paid in twelve equal monthly installments in advance, on the first day of each calendar

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month during the term. Rent for any period of less than one month shall be equal to 1/30 of the monthly rent for each day of such period.

IBM shall supply all services to Landlord at IBM's cost pro rated per square foot of space that Landlord has under sublease. IBM shall bill Landlord for such services within sixty (60) days after each twelve (12)-month period of the sublease term and Landlord will reimburse IBM within thirty (30) days after receipt. Should Landlord fail to so reimburse IBM, IBM may deduct said amount from its rental due hereunder.

This sublease shall be upon all of the same terms and conditions of the within lease except that the provisions of Paragraph 17 shall not be applicable and should Landlord exercise its rights to assign or sublet it will do so subject to the provisions of Paragraph 24.

27. The Landlord covenants that the Tenant shall not be liable for any loss, injury (including death) or damage to any person or property on or about the premises, from any cause prior to occupancy of the premises by the Tenant.

28. This lease shall not be binding and in effect until a counterpart hereof has been executed and delivered by the parties each to the other. This lease contains the entire agreement of the parties and may not be modified except by instrument in writing.

29. This lease shall bind and inure to the benefit of the parties hereto and their respective heirs, representatives, successors or assigns (provided that this lease

Exhibit V, Annexed to Affidavit of Thomas F. Daly

shall not inure to the benefit of any assignee pursuant to an assignment which is not in compliance with the terms of this lease).

IN WITNESS WHEREOF, this instrument has been duly executed by the parties hereto as of the day and year first above written.

By: Illegible.

Title:

Landlord

INTERNATIONAL BUSINESS MACHINES CORPORATION

By: Illegible.

Title: Controller

Tenant

Affidavit of Robert Layton in Opposition to Motion.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York,
County of New York, ss:

ROBERT LAYTON, being duly sworn, deposes and says:

1. This affidavit is submitted pursuant to permission of the Court on oral argument herein on May 7, 1968 and for the purpose of annexing hereto copies of certain portions of the sworn depositions of defendants International Business Machines Corporation and Benderson Development Company, Inc. and plaintiff. Portions of said testimony controvert the recently submitted affidavit of Thomas F. Daly, facts alleged to be undisputed by the movant herein, and substantiate the position taken by the plaintiff. There follows a listing of the testimony annexed hereto:

1. Deposition of Thomas F. Daly: p. 38; pp. 100-102; pp. 131-132.

2. Deposition of Jack Chesbro individually and on behalf of Benderson Development Company, Inc.: pp. 99-101; pp. 123-124; p. 131; pp. 161-163.

3. Deposition of Manuel M. Koufman: p. 12; pp. 106-107; p. 154; p. 166.

(Sworn to by Robert Layton, May 15, 1968.)

**Pages 38, 100-102 and 131-132 of Deposition of
Thomas F. Daly, Annexed to Affidavit of Robert
Layton.**

(See opposite and following pages.)

1
2 Q You really can't recall now whether there was
3 any greater chance it was in 1961 than in 1960.

4 A No.

5 Q Was the authorization you prepared in writing?

6 A Yes.

7 Q Was it submitted to anyone superior to you within
8 the IBM Company?

9 A Yes.

10 Q Did there ever come a time when such authoriza-
11 tion was approved by your superiors within the IBM Company?

12 A Yes.

13 Q Was there a period of time between the submis-
14 sion of the authorization and the approval?

15 A Yes.

16 Q Can you approximate for me how much time elapsed
17 between the submission and the approval?

18 A I don't recall.

19 Q Was it, to your recollection, months or years?

20 A I would say months.

21 Q Do you recall what year the approval was
22 received or made?

23 A I don't recall.

24 Q If I suggested September 1961, would that re-
25 fresh your recollection in any way?

1
2 an annual basis.

3 Q I will show you a copy of Defendant IBM's Ex-
4 hibit A for identification, which I believe is the May 23,
5 1963 proposal along with a blank letter which was to be
6 sent back to you, Mr. Daly, and call your attention to
7 the paragraph alongside of "Rental" and ask you whether
8 that refreshes your recollection.

9 A I would say we changed it.

10 Q It's somewhat changed; is that right?

11 A Under "Rental," yes.

12 Q Is it correct that you requested individuals
13 who were submitting proposals to complete at least one of
14 items I through IV?

15 A Mm-hm.

16 Q Is that correct?

17 A Mm-hm, yes.

18 Q You did not require them to bid on all four
19 items; is that right?

20 A We did not require them to put a proposal in on
21 all items, no.

22 Q You did require them to complete items V and VI,
23 however; is that right?

24 A Yes.

25 Q Were the general conditions of proposal prepared

1
2 in conformity with the authorization for the project
3 which had been given by the IBM Corporation to the Real
4 Estate Department?

5 A Were they within the authorization?

6 Q Yes.

7 A If they come within the dollars, yes. The
8 authorization did not prescribe how it would go out.

9 Q Could you tell me what the dollar requirements
10 in the authorization were?

11 A I don't recall the exact amount.

12 Q Do you have any idea at all?

13 A Oh, somewhere between \$130,000, I believe, and
14 \$140,000 a year in rental, something like that.

15 Q What was the term of the lease?

16 A As I recall, 17 years.

17 Q Did you review the proposals that came in from
18 the various people who bid?

19 A Yes.

20 Q Did you make any recommendation concerning which
21 of those proposals should be accepted?

22 A As I recall, yes.

23 Q Which of them did you recommend be accepted?

24 A As I recall, Mr. Koufman's; and principally I
25 think it was item III.

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Q Are you referring to Mr. Koufman's proposal
on item III?

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A Over-all proposal and item III, which was the one
with the subleased income.

6

7

Q You said his over-all proposal and particularly
his proposal on item III?

8

A Mm-hm.

9

Q Yes?

10

A Yes.

11

12

Q Did you convey that information to Mr. Roper or
anybody else?

13

A Well, yes.

14

Q How?

15

A I discussed it with him.

16

Q What, if anything, did he say?

17

A I don't recall.

18

19

Q Who made the decision as to which bid would be
accepted?

20

21

22

23

MR. HEMPHILL: I object to the question on the
ground that it calls for a conclusion that a decision
was made that a particular bid or proposal would be
accepted.

24

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Q Was a decision ever made that a particular bid
or proposal would be accepted?

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Q All right.

A Leaving a net cost to the IBM company of \$74,275.

Mr. Koufman said that during the first five years of the lease IBM would pay him \$96,600 and he would reimburse us \$36,000, meaning that the net cost to the IBM Corporation as rental would be \$60,600 a year.

Q Is that the reason why Mr. Koufman's bid was preferable to Mr. Chesbro's?

A That, and across the board he was 7.2 to 8 percent and he showed a definite interest in taking it anyway, while Mr. Chesbro, or Benderson Development Company, indicated that they did not want any responsibility for the maintenance of the building.

Q What item are you referring to?

A Items II and IV differ from I and III, as I remember, that the landlord will be responsible for the maintenance of the building.

Q You mean that Mr. --

A Benderson.

Q They didn't bid on those items.

A Didn't want to be responsible for the maintenance of the building.

Q What about the two of them on item I?

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A Benderson Development Company was \$94,933
and Mr. Koufman was \$96,600.

Q I gather, then, your testimony is that item I
was of less interest to IBM than item III.

A At that time, yes.

Q At what time are you referring to now?

A 1963.

Q To, let's say, June 24th of 1963, the month of
June 1963?

A Yes, about that time.

Q Take a look at the second page of Plaintiff's
No. 26, Mr. Daly. Under the heading "Approved Proposal,"
would you tell me why you say that the annual rent that
you were looking for was between \$130,000 and \$134,000.

A That was my estimate.

Are you referring to the total annual rent here?

Q Yes.

A This would include taxes and insurance.

Q Taking out taxes and insurance, what would the
figure be?

A I guess my recollection was between \$100,000 and
\$137,000.

Q And in the light of that, you would still stick
with that same estimate?

247a

(This page intentionally left blank.)

**Pages 99-101, 123-124, 131 and 161-163 of Deposition
of Jack Chesbro, Individually and on Behalf of Ben-
derson Development Company, Inc., Annexed to Affi-
davit of Robert Layton.**

(See opposite and following pages.)

1
2 A (Reading) That makes sense. This one does not
3 (indicating and reading).

4 I doubt very much that we signed that one, and
5 that perhaps was amended and that we signed it. We
6 signed it in error, because it obviously conflicts with
7 the paragraph previously.

8 Q It does not make any sense.

9 A But there is no reason to fear. The intent is
10 clear.

11 Q What should that amount have been if it had been
12 properly drawn?

13 A Well, the amount is not in controversy here.
14 It is the wording. If you want to talk about this para-
15 graph, that amount is correct (indicating page 1).

16 Q That amount is correct?

17 MR. WEINSTEIN: May I see that exhibit, please?

18 MR. LAYTON: Yes.

19 (Mr. Layton handed document to Mr. Weinstein)

20 THE WITNESS: My counsel just points out some-
21 thing to me here which we have both misinterpreted,
22 which makes us both wrong. I am talking to Mr.
23 Layton.

24 Item 1 says if we are awarded the building, that
25 we would have received \$168,000 from IBM for our total

1
2 expenditure, are going to get that money back because
3 we are now becoming the investor and the owner.

4 If we are not the bidder, if we are not the suc-
5 cessful bidder, we agree to sell the land to the suc-
6 cessful bidder; and, in selling it, he gives us
7 \$168,000, because he is getting his feet wet all the
8 way.

9 So we are holding this money that naturally should
10 at this time belong to IBM so they are asking it back.

11 So I now I retract that statement and say we
12 probably did sign the document, because, under the
13 circumstances, it does make sense.

14 Q But didn't you sell it to the successful bidder
15 for \$153,000?

16 A No, not if I paid out \$168,000.

17 Q But you are limited by this agreement to sell it
18 to the successful bidder for \$153,000.

19 A For the immediate land.

20 Q The only difference may be the commission that
21 you told us about before?

22 A Yes.

23 Q Is he supposed to pay these commissions retro-
24 actively?

25 A Certainly. If we paid out \$168,000 for commission

1 on land, and having been given the money by IBM. Right?

2 Q Yes.

3 A We transferred this entire package to the suc-
4 cessful bidder and we got \$168,000 -- from the successful
5 bidder.
6

7 Q Despite the fact that that agreement says \$153,000?

8 A I wouldn't make that unless I got my money back.
9 I wouldn't take a loss of some \$15,000. Right?

10 This is the intent of the whole deal. When we
11 are given that money, we expect to give it back to IBM be-
12 cause that is where it belongs.

13 Q Then you agree with the fact that there is ap-
14 parently an error between paragraph 2 in the letter of
15 April 29, 1963. and paragraph 2 in the letter of June 21,
16 1963?

17 A Well, let me review this carefully with my
18 counsel before I answer.

19 MR. LAYTON: Surely.

20 (Discussion off the record)

21 A (Continuing) This agreement wouldn't lose me any
22 money. If they gave me \$168,000 and I paid out \$168,000
23 and I transferred the land for \$153,000 to John Doe, I
24 have not lost any money.

25 Q Indeed, you have made \$15,000.

1
2 Q How did you compute the \$75,000 figure which
3 you indicated you would require as rental during the third
4 five-year renewal term?

5 A That was the balance of \$94,000 less the \$22,000
6 that would be deducted to the rentable space. It was
7 charged against the total rent.

8 Q Where is that \$22,000 indicated?

9 I am referring to your item I proposal, the
10 \$75,000 figure at the bottom there.

11 A I reduced the rent because the mortgage had been
12 paid off supposedly, the cost of the mortgage.

13 Q The cost of the mortgage would have been paid
14 off and therefore you required less rent.

15 How did you arrive at the figure of \$75,000?

16 A Just grabbed it out of the air.

17 Q Just grabbed it out of the air? A guesstimate?

18 A I wouldn't even call it guesstimate.

19 Q Pure speculation? Did you make this change
20 from the words "awarded to us" to "to commence construc-
21 tion"?

22 A Yes.

23 MR. WEINSTEIN: You are referring now to what,
24 Mr. Layton, for the record?

25 Q Would you indicate the change on page 1 of

1
2 Plaintiff's Exhibit No. 10. Could you tell us why you
3 changed that?

4 A I really don't know. I will tell you why:
5 They requested their money back in 30 days after awarding
6 the contract; and knowing that 30 days was the roof period
7 and we wouldn't be under construction and have everything
8 resolved in that length of time, I wanted to pay them the
9 money when we commenced construction, so if there were
10 any feet dragging, I didn't want my money invested there
11 idly.

12 Q Referring to page 3, to the columns there --

13 MR. WEINSTEIN: What exhibit?

14 MR. LAYTON: No. 10 for identification.

15 Q -- could you indicate to us what you meant by
16 the information that you completed in item I and item III?

17 MR. WEINSTEIN: Would you repeat the question,
18 please.

19 (The pending question was read by the
20 reporter.)

21 A Yes. That represents -- that is a continuation
22 of item V on page 2. It indicates and it requests that
23 you indicate the price that you are willing to sell the
24 building for.

25 Q During a certain period of time?

Q Did you receive a response to this proposal?

A I think I eventually received the proposal back saying that I wasn't the successful bidder and therefore they were returning this document.

Q The document was physically returned to you, to your recollection?

A I believe so, in the middle --

Q Let me show you an unaddressed copy of what purports to be a form letter dated June 24, 1963, and simply ask you whether you recall receiving a letter like this addressed to you.

MR. LAYTON: Off the record, first.

(Discussion off the record)

A Yes, I think I received this letter.

MR. LAYTON: Mark this the next exhibit.

(Unaddressed copy of form letter dated June 24, 1963, signed "Thomas Daly, Administrator of Real Estate Department," marked Plaintiff's Exhibit 11 for identification.)

MR. LAYTON: Let us go off the record now.

(Discussion off the record)

(Whereupon, at 5:20 P.M., the deposition was adjourned to Saturday, December 3, 1966, at 11:00 A.M., same place.)

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A After July 9th we owned the place.

Q Now, after June 24, 1963 sometime you found out that Koufman was whatever you had hoped to be in submitting Plaintiff's Exhibit No. 10?

A Oh, I don't say that. I don't think Manny will ever be what I hope to be.

Q Without trying to indicate that that was exactly what I was asking --

A Would you repeat the question.

Q In submitting Plaintiff's Exhibit No. 10 for identification, you hoped to get some kind of affirmative response from IBM?

A Correct.

Q You got a negative response.

A Correct.

Q You found out Mr. Koufman got an affirmative response.

A Eventually.

Q Eventually you found out he got an affirmative response.

A Correct.

Q Did you undertake any efforts to transfer title of the property to Mr. Koufman?

A If we were directed to, I am sure we would respond

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2 to such a direction.

3 Q Did you receive any such direction?

4 A I can't recall. I can't recall having re-
5 ceived it. Again, that will be in the record, I am sure.

6 Q When you say "record," you are referring to
7 written documents?

8 A Yes.

9 Q You submitted this Plaintiff's Exhibit No. 10
10 on or about June 7, 1963; is that right?

11 A Yes.

12 MR. HEMPHILL: By "this," do you mean Plain-
13 tiff's Exhibit No. 10?

14 MR. LAYTON: The question so indicated.

15 Q On June 21, 1963 you and someone else on behalf
16 of Benderson signed this agreement reflected in Plaintiff's
17 Exhibit No. 7 for identification; is that right?

18 A Yes. I wouldn't say when we signed. You are
19 assuming it is June 21. It would have to be when the
20 girl typed it.

21 MR. LAYTON: Right. Let us go off the record.

22 (Discussion off the record)

23 Q On or about June 21st, in that vicinity, a couple
24 of days here or there; right?

25 A Yes.

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2 Q Now, on or about June 24, 1963 -- and I am
3 showing you Plaintiff's Exhibit No. 11 for identification
4 -- you found out that you were not successful as far as
5 becoming the developer of this project is concerned: is
6 that right?

7 A You say on or about this date? Yes.

8 Q Somewhat after it?

9 A Yes.

10 Q Did anyone from IBM contact you and say you
11 should be prepared to transfer title to this land to Mr.
12 Koufman?

13 A I can't recall that that happened.

14 Q Ever?

15 A Well, I can't say. I really can't recall if
16 it happened or not.

17 Q When you found out that you were not going to
18 develop this project, Mr. Chesbro, and you had a commit-
19 ment to the Town of Cranford to develop it, didn't you think
20 that you had to make arrangements with the Town of Cranford
21 anyway for someone else to take it over?

22 A Sure.

23 Q Did you do anything about that or were you waiting
24 to hear from IBM?

25 A I was waiting to hear from IBM.

Pages 12, 106-107, 154 and 166 of Deposition of Manuel M. Koufman, Annexed to Affidavit of Robert Layton.

(See opposite and following pages.)

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2 Q Who asked you that?

3 A Mr. Daly.

4 Q When did that conversation take place?

5 A Oh, I don't know. It was sometime perhaps in
6 March or April of '63.

7 Q Where did the conversation take place?

8 A At Madison Avenue, 425 -- I mean Park Avenue,
9 425 Park.

10 Q Did it take place in an office?

11 A In Mr. Daly's office.

12 Q What was said on that occasion?

13 A He said, "We're going to do a building in
14 Cranford, New Jersey, about 50,000 square feet of office
15 space, but you won't get the opportunity to bid as a con-
16 tractor or builder. We're going to go the route of
17 having developers bid it as owners, but we are already
18 in the process of inspecting bids from contractors for
19 the structure itself. We are going to have the building
20 built; we've got the architect, whose plans are completed,
21 and all you have to do in this case will be loan us the
22 money. Would you be interested in building -- would you
23 be interested in ownership with the knowledge that you
24 are not going to get the opportunity, or your company the
25 opportunity, to build it? All we want is the money."

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2 Q Was there anything said, during the course of
3 your conversation following the bid-opening, on the subject
4 of IBM's making a firm commitment with you to go ahead
5 with the project?

6 A Yes.

7 Q What was said on that subject?

8 A Mr. Roper said that if there was a saving of
9 close to a couple of hundred thousand, that he'd go ahead
10 with it on their own without going to anybody else; if
11 the savings were less than that but more than a hundred
12 thousand, they might have to go to higher authority,
13 which they could do but they preferred not to do.

14 Q Were you talking, during the course of that
15 conversation, on the basis of a 17-year lease term to IBM?

16 A Yes.

17 Q Other than what you have already testified to,
18 was anything else said, during the course of that conver-
19 sation following the bid-opening, on the subject of the
20 authority or lack thereof of the IBM personnel present,
21 Messrs. Roper, Daly and Chessa, to make a commitment to
22 you on the basis of the proposal as it stood following
23 the bid-opening?

24 A No, they indicated to the contrary, that the
25 proposal was in good standing and that they would adhere

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2 to the formula and contract as written.

3 Q Was anything else said on that subject?

4 A Mr. Roper had said he hoped that I could re-
5 duce the cost a couple of hundred thousand dollars; and
6 again I repeated and reassured him that if I could I
7 would, but the likelihood of a hundred to a hundred thirty
8 to forty might be more reasonable.

9 Q Was anything else said on the subject of the
10 authority of the IBM personnel to make a commitment with
11 you on the basis of the low contractor's bid?

12 MR. LAYTON: Other than what has already been
13 testified to.

14 MR. HEMPHILL: Yes, other than what he has
15 already testified to.

16 A No.

17 Q Was there any discussion, during your conversa-
18 tion following the bid-opening, on the subject of scrapping
19 the project and starting all over?

20 A No.

21 Q Other than what you have already testified to,
22 Mr. Koufman, was there any other discussion which took
23 place following the bid-opening at the Waldorf Astoria
24 in connection with the Cranford project?

25 A Yes.

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2 the papers so that I could prosecute this contract.

3 Q Was that before or after the final estimated
4 cost was fixed?

5 A I think it was after.

6 Q And your recollection of the point in time that
7 the final costs were fixed after efforts to reduce costs
8 had been made occurred either in the first, second or
9 third week in August; is that correct?

10 A I think so.

11 Q Did you take any steps in June, July or August
12 to tie up the land in Cranford?

13 A I was told by Mr. Daly that it wasn't necessary
14 because they had it well in control and were not in
15 jeopardy of losing it.

16 Q When did Mr. Daly tell you that?

17 A He told me that immediately after I was noti-
18 fied that I was selected as the one with whom they would
19 enter -- whose contract they accepted.

20 Q Are you referring to Defendant IBM Exhibit C
21 for identification when you speak of that notification?

22 A My memory serves me vaguely that I was notified
23 orally that I was selected, and that this letter of June
24 24th came in after I was orally selected, in which case
25 the conversation with Daly about acquiring the land could

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2 A I don't know.

3 Q Did IBM ever advise you of the particular item
4 in your June 5, 1963 proposal that they were interested
5 in?

6 A I was advised of that the day I arrived in
7 their office, before we went up to the opening of the
8 bids.

9 Q What item were they interested in?

10 A I.

11 Q Who told you that?

12 A Mr. Daly and Mr. Roper.

13 Q Did anyone else tell you that IBM was interested
14 in item I?

15 A Only they.

16 Q You made references to discussing with Messrs.
17 Daly and Roper the consequences of a possible change in
18 the money market. What change in the money market was
19 anticipated by you at that time?

20 A There was an imminent change that would re-
21 flect anywhere from a quarter to a half or three-quarters
22 of a point, depending on the nature of the vehicle that
23 you were dealing with.

24 Q With reference to the Cranford project, what
25 change in the money market did you anticipate during

agreement that you made with me, which is simple and I have no right to expect."

Q At the time you requested Mr. Daly to make arrangements for you to meet with Mr. Wright or someone with greater authority than Mr. Daly, what was the position of Mr. Daly, as expressed to you, as to the rent and terms of years he would consider on behalf of IBM?

A I was under the impression and told him that I thought he was badgering me for something --

MR. LAYTON: Would you read the question back to the witness.

(The reporter read the pending question.)

A (Continuing) Mr. Daly was looking for me to agree to signing a contract to produce this for \$128,000 rent on a 17-year lease basis.

Q What position had you expressed to Mr. Daly as to the terms under which you would go ahead with the project?

A I said that the amount that he proposed was inconsistent with the contract and agreements that he had made with me.

Q What agreements had Mr. Daly made with you at that point in time?

A He had agreed to pay me 7.8 for increases in

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2 expenses over and above the stipulation of the original
3 contract. He had agreed to pay me a differential, should
4 it arise, in the cost of rate of finance because of their
5 inability to have responded so that I could get a set-
6 aside of money within a reasonable period of time. And
7 he had agreed to pay me for the services rendered in
8 connection with the economy of \$190,000 reduction in cost
9 of building at some arbitrary figure, where they would
10 benefit by it as well as I.

11 Q Had any other agreements been made between you
12 and Mr. Daly at the point in time that you requested him
13 to make arrangements to let you see Mr. Wright?

14 A This, in substance, was it.

15 Q When do you claim that an agreement was made
16 between you and Mr. Daly to pay a differential in the
17 rate of finance?

18 A When I advised him on more than one occasion
19 that this was a reality that was going to take place, and
20 that if it did take place, that they would be responsible.

21 His reply was, "If it takes place, you would be
22 entitled to whatever the difference is on the prime rate
23 and we have to pay it and we will pay it."

24 He didn't say -- I want to correct that. He
25 did say, "We'll pay the difference of the prime rate if

Opinion by Wyatt, District Judge.

WYATT, District Judge:

This is a motion by defendant International Business Machines Corporation (IBM) for summary judgment in its favor as to the claim contained in count I of the complaint. Fed. R. Civ. P. 56(b).

The action was commenced in this Court on March 29, 1966. There are three claims in the complaint set out in three separate counts. There are three defendants. Count I is directed against IBM alone, count II against the other two defendants, and count III against IBM alone.

Jurisdiction as to count I is asserted by reason of diversity of citizenship. 28 U.S.C. §1332. Plaintiff Koufman is said to be a "resident" of Massachusetts. This is not a proper averment of citizenship but for present purposes it will be assumed that he is a citizen of Massachusetts. The citizenship of IBM in New York is properly averred.

Plaintiff has demanded trial by jury.

The averments of count I are in substance that about June 25, 1963, Koufman and IBM made a written contract under which Koufman agreed to develop a tract of land in Cranford, New Jersey (including apparently the construction of a building on the land) and to lease to IBM "the building constructed on said land", with an option to IBM to buy the land and building; and that IBM broke the contract to the damage of Koufman. The obligations of IBM under the contract are not stated but one such may be assumed to have been that IBM would lease a building from Koufman. The complaint avers that after making the June 25, 1963 contract with Koufman, IBM notified him that it had made a contract with someone else for development of a tract in Cranford.

Material facts as to which there is no genuine issue require that the motion of IBM be granted. Three propositions of law are established by the undisputed facts.

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There was never any agreement between the parties because IBM never accepted any offer of Koufman. If there was any agreement by IBM, it was not capable of enforcement because it was not sufficiently definite. Even if it was sufficiently definite, the claimed agreement would be bad under the statute of frauds.

IBM wanted to arrange for some outside investor to buy a specific tract of land (about 6 acres) in Cranford, to erect a building on the land from plans and specifications done by an architect for IBM, and then to make a lease of all or part of the building to IBM.

A deal was worked out by IBM with Benderson Development Company, Inc., one of the defendants in the second count, under which Benderson bought the land and agreed that if Benderson itself did not become the investor to erect the building then Benderson would sell the land to the investor to whom the "building" was "awarded" by IBM.

Under date of May 23, 1963, Daly (in the Real Estate Department of IBM) sent to a number of possible investors, including plaintiff Koufman, an invitation to submit "a proposal for the construction and leasing to IBM of the proposed building".

The proposal was to be on a form supplied by IBM. "General Conditions for Proposal" were sent also, as a memorandum of the same date (May 23, 1963). The estimated costs of land and building were given, the length of the lease to be taken, and other information. As to the "form" of lease to be taken by IBM it was stated: "Standard IBM form will be used as applicable". With respect to taxes and insurance it was stated that these were not to be considered in the proposal but that "responsibility for these items will be negotiated by the parties at a later date".

The proposal was asked to be made in four different and alternate ways, evidently to allow IBM to choose one

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from the four alternatives. The different alternatives were called "Item I" and so on. The investors, however, could bid on as many or as few of the alternatives as they wished.

The first alternative (Item I) was for an annual rental of the *entire* building and IBM would be responsible for maintenance.

The second alternative (Item II) was for an annual rental of the *entire* building and the investor would be responsible for the maintenance.

The third alternative (Item III) was (in substance) for an annual rental of *part* of the building and IBM would be responsible for maintenance.

The fourth alternative (Item IV) was (in substance) for an annual rental of *part* of the building and the investor would be responsible for the maintenance.

There was a further alternative. IBM was to have a right to purchase the property and asked for proposed purchase prices, including outstanding mortgages, at various times and under each of the four first alternatives given. But IBM asked the investor to specify whether at such purchase prices IBM would be required to assume outstanding mortgages or not.

Under date of June 6, 1963, Koufman sent his proposal to IBM on the form which IBM had supplied. Koufman gave his proposed rental and purchase dollar amounts under each of the alternatives shown on the form. Koufman did not indicate, however, whether or not his purchase prices to IBM required IBM to assume outstanding mortgages. Koufman supplemented his proposal with a fifth and different rental and purchase alternative. The significance of the differences of the fifth alternative from the others is difficult for me to appreciate and not necessary for this decision; apparently it introduced the con-

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cept of a "net, net, net up to" basis; in any event, the fact is that the fifth alternative added by Koufman was different from the others.

Apparently IBM had itself asked for bids from contractors for construction of the Cranford building. The bids were opened at a New York hotel on June 19, 1963. Koufman was in the IBM office on that day before the opening of bids and was invited by IBM to go to the opening of bids, apparently because Daly and Roper (also of IBM) thought that Koufman would be selected as the investor. According to Koufman's testimony by deposition, Daly and Roper told him on that day that IBM was "interested" in Koufman's proposal under the first alternative (Item I). For purposes of the present motion, this will be assumed to be the fact. (It seems likely that Koufman is mistaken. A memorandum made by Daly at the time indicates that Koufman was low among four "bidders" under alternatives three and four (Items III and IV) but was not low among eleven bidders under the first alternative (Item I).)

Under date of June 24, 1963, Roper of IBM, signing himself "Manager Real Estate Department" wrote Koufman that IBM had "reviewed" his "bid" and had found that he was "the successful bidder". He was asked to see the architect about plans and specifications and "to take whatever steps are necessary to secure the land for which IBM has arranged in your name".

Apparently IBM felt that the cost of construction as shown by the bids opened on June 19, 1963, was much higher than expected and asked Koufman to try to reduce the cost. At some time after June 24, 1963, differences developed between IBM and Koufman.

Under date of August 27, 1963, Daly wrote Koufman that IBM had no choice but "to cancel out previous commitment" to him because Koufman would not carry out

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"the terms of [his] proposal which IBM had accepted". Koufman made no arrangements to buy the land in Cranford.

This action was commenced on March 29, 1966.

IBM asserts that the substantive law of New York is applicable. Counsel for plaintiff do not disagree and appear to assume that New York law is applicable. Without discussion, New York courts have applied New York law in a case where the land to be developed was outside New York and where the situation was otherwise like that at a bar. *St. Regis Paper Co. v. Rayward*, 16 A. D. 2d 130, 225 N. Y. S. 2d 871 (1st Dept. 1962), *aff'd* without opinion, 12 N. Y. 2d 1033, 239 N. Y. S. 2d 551, 189 N. E. 2d 815 (1963). This result seems indicated by the principles laid down in *Auten v. Auten*, 308 N. Y. 155, 124 N. E. 2d 99, 50 A.L.R. 2d 246 (1954).

It must be emphasized that the claim in count I is on a "written contract" which was "entered into" on or about June 25, 1963 (complaint, para. 4). Koufman testified that it was probably on June 25, 1963 that he received the Roper letter dated June 24, 1963. Koufman testified that the "written contract" consisted of three documents: (1) the invitation of IBM (Daly) dated May 23, 1963; (2) the IBM proposal form signed by Koufman and dated June 6, 1963; and (3) the letter of IBM (Roper) dated June 24, 1963. Koufman's opposing affidavit (p. 3) described his June 6, 1963 signed form as his "offer" and the IBM June 24, 1963 letter as the "acceptance". Likewise the opposing affidavit (pp. 1, 2) of counsel to Koufman describes the signed form dated June 6, 1963 as Koufman's "offer" and then states: "IBM accepted plaintiff's offer by a writing dated June 24, 1963". The statement for plaintiff under General Rule 9(g) makes exactly the same analysis.

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[1] The evidence seems clear that despite the loose language of Daly and Roper ("Successful bidder", "commitment to you", "accepted", etc.) the parties did not intend the three documents to be any final agreement. They were not intending thereby to contract but to begin final negotiations with each other (excluding the other investor bidders) in the expectation that they would reach an agreement. At that last point they must have contemplated the execution of a letter agreement with specific provisions (such as that actually executed between them under date of June 13, 1963 in respect of a building to be constructed in Utica) to be followed by execution of a lease.

For purposes of this motion, however, it will be assumed that the parties intended to make a contract by means of the June 6 "offer" and the June 24 "acceptance".

It is apparent from the face of the "offer" and "acceptance" that no enforceable agreement was created between the parties.

In the first place, the "acceptance" was not sufficient to constitute any agreement because it did not specify which of the various alternatives IBM accepted. The proposal of Koufman was not one offer but a number of alternative and mutually exclusive offers. Only one of these could be accepted. IBM did not state in its "acceptance" to which of the offers it was directed. Did IBM accept to lease the entire building or only part? Did IBM accept to be responsible for maintenance or for Koufman to be responsible? Did IBM accept the "further proposal", the fifth alternative, suggested separately by Koufman in his June 6, letter? Did IBM accept to assume outstanding mortgages if it exercised the option to purchase the land and building?

The situation is like that referred to in the Restatement: "An offer * * * may contain a choice of terms from which the offeree is given the power to make a selection

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in his acceptance". Restatement of Contracts, §29 (1932). Under this section (as slightly rewritten) in a later Tentative Draft Restatement appears this explanation (Restatement (Second) of Contracts §29 (Tent. Draft No. 1, 1964):

"An acceptance to be effective must comply with the terms of the offer, and those terms or the circumstances may make it plain that the acceptance must specify terms. * * * In such cases the offer does not fail for indefiniteness, but no contract is made by an attempted acceptance which does not supply the term as indicated."

The application of this principle is seen in *Northeastern Const. Co. v. Town of North Hempstead*, 121 App. Div. 187, 105 N. Y. S. 581 (2nd Dept. 1907), very much like the case at bar. The Town called for bids on a bridge, prices to be given for a five span construction and a four span construction. Plaintiff submitted different prices for five span and four span. The Town Board resolved that the bid of plaintiff for the bridge "be accepted". The Court held that there was no contract formed by such an acceptance, saying:

"Two bids were asked for, two bids were made, and there was but one bridge to be constructed. The general resolution of acceptance of the plaintiff's proposition was not entering into a contract for the construction of a four or five span bridge. It was merely a notification that both of the bids were lower than other bids, but the contract was yet to follow; and this was clearly contemplated by the form which was given out for such a contract, in company with the plans and specifications."

See also a classic decision in New York, frequently cited, *Chicago & G. E. R. R. Co. v. Dane*, 43 N. Y. 240 (1870).

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[2] In the next place, it is evident that if an agreement was formed, it is too incomplete, uncertain and indefinite to be enforced. The same questions must be asked in this connection as were asked in the second paragraph above. But there are further missing elements to raise other questions. Who was to be responsible for taxes and insurance? The invitation of IBM flatly stated that this would "be negotiated by the parties at a later date". The argument for Koufman is persuasive that it must have been part of the invitation that IBM would ultimately absorb taxes and insurance; otherwise, the proposed rental figures by the investors would be meaningless. But how the "responsibility" for taxes and insurance would be handled—a significant element in any event—was left to future negotiation. Further: when was the 17 year lease to commence? Nothing was said about this. When was the building required to be completed? Nothing was said about this. In contrast, the letter agreement between the parties, dated June 13, 1963, with respect to the Utica property, provided for a specific completion date and a specific lease commencement date.

[3] Where the agreement of the parties is incomplete, uncertain and indefinite the courts are unable to enforce it either by specific performance or by an award of damages. Restatement of Contracts §32; Restatement (Second) of Contracts § 32 (Tent. Draft No. 1); 1 Corbin on Contracts §95 (1963); *Ginsberg Machine Co. v. J. & H. Label, etc. Corp.*, 341 F. 2d 825, 828 (2nd Cir. 1965); *Brause v. Goldman*, 10 A. D. 2d 328, 199 N. Y. S. 2d 606, 612—614 (1st Dept. 1960), aff'd without opinion 9 N. Y. 2d 620, 210 N. Y. S. 2d 225, 172 N. E. 2d 78 (1961).

In *Brause v. Goldman*, summary judgment was ordered for defendant, reversing the Special Term.

St. Regis Paper Co. v. Rayward, cited above, is strikingly similar to the case at bar. There also summary

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judgment was ordered, dismissing a counterclaim on an alleged contract and reversing the Special Term.

In the case at bar, it would be impossible to decree specific performance because the Court is unable to determine what IBM agreed to perform. For the same reason it would be impossible to award damages; it may be noted in this connection that the computation of damages would depend on the specific promises which IBM had failed to perform and there are no specific promises.

It was earlier emphasized that this is a claim for breach of a "written contract" said to have consisted of three particular documents, the second of which was the offer and the third was the acceptance.

[4, 5] It is suggested at one point for Koufman that the defect in these documents can be repaired by reference to deposition testimony of Koufman (accepted as true on this motion, namely, that he was told that IBM was "interested" in Item I, the first alternative. It is suggested (memorandum for plaintiff, p. 2) that IBM thereby "orally accepted" Koufman's proposal under Item I. In point of fact, this cannot be. An acceptance must be "positive and unambiguous". 1 Williston on Contracts (3rd Ed.) 235. An offeree who says "I am interested in your offer" is obviously not accepting and not promising anything. The language means simply "my attention is engaged" or "my curiosity or sympathy is aroused", as the dictionary states (Webster's Third, p. 1178), or possibly "I am considering your offer". The language cannot possibly support the meaning of a *then* acceptance.

Koufman points to a memo by Daly in pencil, comparing the various bids at the time and with a checkmark at the name of Koufman. It is said that the checkmark is "next to Item I * * * indicating IBM's acceptance of proposal Item I" (Layton affidavit, p. 8). The loca-

Opinion by Wyatt, District Judge

tion of the checkmark at the name of Koufman seems reasonably to evidence that *he* is the best bidder and to indicate nothing as to which of his alternatives would be best for IBM. In any event, the checkmark is not itself any acceptance and not claimed to be such.

In point of law, moreover, there could be no real acceptance by IBM because of the statute of frauds. In New York, a "contract for the leasing for a longer period than one year" of land must be in writing. General Obligations Law §5-703(2). The contract claimed by plaintiff was one "for the leasing" by IBM of land for more than one year. The theory of oral acceptance is thus unavailing.

[6] It remains to point out that the statute of frauds is a bar to plaintiff even if the documents alone were held to create a contract. The "acceptance" of June 24, 1963 is signed by Roper. It is beyond dispute that he had no actual authority to contract for IBM. I would agree with plaintiff that Roper had apparent authority to do so. Under the New York statute of frauds, however, this is not enough, for General Obligations Law §5-703(2) requires that the writing must be "subscribed by the party to be charged, or by his lawful agent thereunto authorized by writing". A corporation may only act by agents. Neither Roper nor Daly was authorized in writing to contract for IBM which thus could not in any event be bound by any contract made by them to which the statute of frauds is applicable. *Mondrus v. Salt Haven Corp.*, 270 App. Div. 1030, 63 N. Y. S. 2d 205 (2nd Dept. 1946), motion for leave to appeal denied 270 App. Div. 1046, 63 N. Y. S. 2d 839; *Goldberg v. Spruce Ridge Corp.*, 35 Misc. 2d 253, 229 N. Y. S. 2d 307 (Sup. Ct. 1962); 2 Corbin on Contracts §526 at 781-782 (1950).

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The motion is granted. Final judgment at this time as to Count I is not appropriate, however, and no determination and direction under Fed. R. Civ. P. 54(b) will be made. There must be a trial and IBM remains as a party defendant in the third count. If there is to be any appeal, it should include everything; the action should not go up piecemeal. Moreover, IBM did not make the motion until after the action was on the Permanent Calendar and after a pre-trial order had been made. There should be a speedy trial which should not be delayed by any appeal from this order.

So ordered.

Order Appealed From.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[NAME REDACTED]

It appearing that the above action has been pending for more than nine years; that, the Court granted summary judgment in favor of International Business Machines Corporation ("IBM") on February 4, 1969 (Wyatt, J.), on Count I of the Complaint and now determines there being no just reason for delaying the entry of final judgment on said Count; that, Count II of the Complaint against Benderson Development Co. and Jack Chesler was ordered stayed on the consent of the parties on May 26, 1969; that, plaintiff and defendant have conditionally settled Count III of the Complaint; that, all parties to the above action have stipulated that Counts II and III be suspended and closed statistically on the terms and conditions which appear in the stipulation annexed hereto; that, for reasons beyond the control of the Court, Counts II and III can be neither tried nor otherwise terminated at this time; and that, the avoidance of an unnecessary trial of Count III will serve the substantial interests of judicial economy, it is

ORDERED that:

(1) the stipulation dated April 11, 1975, annexed hereto is hereby approved, and made a part hereof;

Order Appealed From

(2) there being no just reasons for delay, judgment is directed to be entered pursuant to Rule 54(b) of the Federal Rules of Civil Procedure dismissing Count I of the Complaint on the merits with prejudice and without costs;

(3) pursuant to Rule 20(A) of the Individual Assignment and Calendar Rules for the Southern District of New York, Counts II and III be closed statistically, and transferred to the Suspense Docket, and that the Clerk submit a JS-6 Form to the Administrative Office of the United States Courts; and

(4) this Order shall not be considered a dismissal of Counts II and III which may be reinstated in accordance with the provisions of the annexed Stipulation.

April 17, 1975

JOHN M. CONNELLO
U. S. D. J.

Judgment Entered
RAYMOND F. BURGHARDT
Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MANUEL M. KOUFMAN,

Plaintiff,

-against-

INTERNATIONAL BUSINESS MACHINES
CORPORATION, BENDERSON DEVELOPMENT
COMPANY, INC. and JACK CHESBRO,

Defendants.

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66 Civ. 907 (JMC)

Cal. No. 95(2)

STIPULATION

WHEREAS, plaintiff instituted this action on March 29, 1966, by the filing of a complaint containing three counts, the first and third of which are against International Business Machines Corporation ("IBM");

WHEREAS, by order entered February 4, 1969, summary judgment was granted in favor of IBM dismissing Count I, but an FRCP 54(b) determination and direction was deferred pending a trial of, and entry of judgment on, Count III;

WHEREAS, Count II against defendants Benderson Development Company, Inc., and Jack Chesbro was severed and stayed by consent order on May 26, 1969, since that Count must fall if the aforesaid dismissal of Count I is



CRAVATH, SWAIN & MOORE,

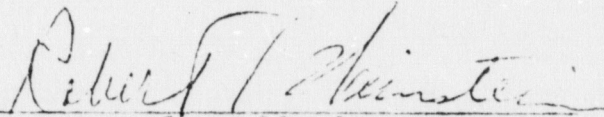
by



A Member of the Firm

Attorneys for Defendant
International Business Machines
Corporation,

One Chase Manhattan Plaza,
New York, N. Y. 10005
(212) 422-3000



Attorney for Defendants
Benderson Development Company,
Inc. and Jack Chesbro,
266 Pearl Street,
Buffalo, New York 14202.

Plaintiff's Notice of Appeal.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

SIRS:

NOTICE is hereby given that Manuel M. Koufman, plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action on the 17th day of April, 1975, dismissing Count 1 of the complaint.

Dated: New York, New York
May 13th, 1975.

WILLIAM T. GRIFFIN
Attorney for plaintiff Manuel M. Koufman
161 William Street
New York
New York 10038
Telephone: 962-5442

To:

Cravath, Swaine & Moore, Esqs.
Attorneys for Defendant
International Business Machines Corporation
One Chase Manhattan Plaza
New York, New York 10005

Robert S. Weinstein
Attorney for Defendants Benderson Development Company and Jack Chesbro
266 Pearl Street
Buffalo, New York 14202

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hereby admitted this 14 day

of August, 197

Charles L. Sullivan

Attorney for



